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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Earl Warren, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

Pan American World Airways, Inc. ("Pan Am") petitions for a writ of certiorari to review a judgment of the United States Court of Appeals for the Ninth Circuit which affirmed an order of the United States District Court for the District of Nevada denying Pan Am's motion for a preliminary injunction against respondents' picketing and similar activities at the Nuclear Rocket Development Station ("NRDS"). Both courts agreed that such activities were enjoinable as violations of the Railway Labor Act ("RLA"), 45 U. S. C. §§ 151-188 (1958), if that Act were applicable. The sole ground of the decisions below

was that the Act is not applicable to Pan Am's employees at NRDS, in Nevada, and, hence, that the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115 (1958), barred injunctive relief. The Court of Appeals made its determination despite the contrary decisions of the National Mediation Board ("NMB") that both Pan Am, as a "carrier", and its employees employed at its space stations (including NRDS), as well as at its airline bases, are subject to the RLA.

The decision of the Court of Appeals, based on the premise that carrier employees not engaged in transportation activities are not subject to the RLA, has established an untenable dichotomy between Pan Am's thousands of employees at the Cape Kennedy ("Canaveral") space station, who have been held by the NMB, since 1956, and by the United States District Court for the District of Columbia to be subject to the RLA, and its NRDS employees engaged in substantially identical work, who are said by the NMB to be under the Act but by the court below, in a collateral proceeding, not to be. In so doing, the Court of Appeals has disregarded the function of the NMB in the administration of the RLA, and the decisions of this Court as to the weight to be given to administrative determinations. The uncertainty thus created as to the coverage of the Railway Labor Act can be resolved only by this Court.

Opinions Below

The opinion of the Court of Appeals (App. A, *infra*, pp. 2a-15a) is not yet officially reported, but may be found in 54 L. R. R. M. 2487 (BNA). The opinion of the District Court (App. A, pp. 16a-22a) is unreported.

Jurisdiction

The judgment of the Court of Appeals for the Ninth Circuit (App. A, p. 1a) was entered on November 5, 1963.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1) (1958). *E. I. Du Pont de Nemours Powder Co.* v. *Masland*, 244 U. S. 100 (1917); *Hanover Star Milling Co.* v. *Metcalf*, 240 U. S. 403, 408-409 (1916); *Forsyth* v. *Hammond*, 166 U. S. 506, 512-514 (1897).

Questions Presented

1. Whether a court, in denying a preliminary injunction against violations of the Railway Labor Act, on the sole ground that the Act does not apply to the employees in question, erred in so deciding in the face of the NMB's long-standing application of that Act to employees identically employed, and to the very employees involved in the matter before the court.

2. Whether the Railway Labor Act applies to employees of a carrier by air who, although not engaged in air transportation activities, perform work substantially identical to that done by the carrier's air transportation employees, and have a direct and common interest for labor relations purposes with such employees.[1]

Statute Involved

The pertinent portions of the Railway Labor Act, 48 Stat. 1185 (1934); 49 Stat. 1189 (1936); 45 U. S. C. §§ 151-188 (1958), are set forth in Appendix B, *infra*, pp. 44a-51a.

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[1]This petition does not present for review, nor would the Court upon review be required to consider, whether the activities of respondents against which the complaint is directed constitute enjoinable violations of the RLA. The Court of Appeals agreed with the District Court that, if the RLA were applicable, an injunction should issue. (App. A, p. 3a).

Statement of the Case

Pan American World Airways, Inc., a New York corporation, is a common carrier by air engaged in interstate and foreign commerce. (R. 7).[2] For approximately ten years, Pan Am has rendered technical and base maintenance services under contract with the United States Air Force at Cape Kennedy, Florida ("Canaveral"), and, for a shorter period, under contract with the United States Army at the Electronic Environmental Test Facility at Fort Huachuca, Arizona. (R. 7, 284-85).

Under contract with the United States Atomic Energy Commission ("AEC"), dated June 28, 1963, Pan Am performs substantially identical services at the Nuclear Rocket Development Station ("NRDS"), Jackass Flats, Nevada.[3] NRDS is the primary research and development test facility for the Nuclear Rocket Development Program, which is a joint program of the AEC and NASA, concerned with research and development, for space travel, of nuclear-powered engines and vehicle stages propelled by those engines. (R. 7, 209; App. C, p. 68a).

The Relationship Among Pan Am's NRDS, Canaveral and Airline Station Employees.

The support services performed by Pan Am's employees at NRDS and at Canaveral are, as the Court of Appeals found, "substantially identical." (App. A, p. 11a; App. C, pp. 54a, 60a, 63a; R. 284).[4] That work, moreover,

[2] References identified by "R", are to pages of the certified Transcript of Record (in two volumes).

[3] This station is administered by the Space Nuclear Propulsion Office—Nevada Extension, an office jointly created by the AEC and the National Aeronautics and Space Administration. ("NASA"). (R. 7; App. C, *infra*, p. 67a).

[4] Pan Am's approximately 6,000 Canaveral employees are responsible for the maintenance of all the facilities at that Air Force base. (App. A, p. 2a). The similar scope of Pan Am's work at NRDS as set forth in its contract with the AEC is described in Defendants' Exhibit A in the District Court. (R. 300-04).

is "identical with the work performed by other employees of the same craft at the regular established [airline] bases of [Pan Am]".[5]

Pan Am's employees at Canaveral, at NRDS and at Fort Huachuca work in the same job classifications and perform identical services in most respects as do those at its airline bases. They are all "employees of Pan Am in exactly the same sense and with exactly the same terms and conditions of employment as employees of other divisions of the company . . . . engaged in air transportation. . . . " (App. C, p. 55a). Employees are transferred from jobs at airline bases to jobs at Canaveral and at NRDS. (App. C, pp. 53a-54a; 65a). Labor relations matters affecting employees at any of the locations throughout the Pan Am system have application to similar employees employed at other locations. Matters of labor policy, affecting rules, rates of pay and other conditions of employment are applicable to employees throughout the system. They are formulated and coordinated at Pan Am's system headquarters in New York City. Questions of their interpretation and application continuously arise and are resolved, because of their system-wide implications, in accordance with system-wide policies. (App. A, pp. 29a, 31a, 38a; App. C, pp. 54a-55a, 65a-66a).

History of NMB Application of the RLA to Pan Am's Space Site Employees.

1. *Pan Am's Canaveral Employees.* In 1950, the NMB, acting under the RLA, certified the Transport Workers Union of America, AFL-CIO ("TWU") as the exclu-

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[5] Decision of the NMB, dated July 10, 1956, p. 4, (NMB File No. C-2202). (R. 226; App. A, p. 29a). The full text of that decision is set forth in Appendix A, at pp. 23a-31a. See also App. C, pp. 63a-65a.

sive collective bargaining representative for the craft or class of airline mechanics (including plant maintenance mechanics and ground service employees) employed by Pan Am anywhere throughout its system in the continental United States. (NMB Case No. R-2225) (R. 194-95). The system-wide boundaries of the group of employees certified as part of the single class or craft was consistent with the NMB's unvarying practice. (App. A, p. 38a; see also, *In the Matter of Representation of Employees of the KLM Royal Dutch Airlines*, NMB File No. C-2098 (1953), 3 Determination of Craft or Class of the National Mediation Board 1). Several years later, Pan Am commenced its operations at Canaveral.

On August 19, 1955, the International Association of Machinists ("IAM") filed with the National Labor Relations Board ("NLRB") a petition for election under the National Labor Relations Act, 29 U. S. C. §§ 151-187 (1958), in a proposed unit confined to some of Pan Am's Canaveral employees, including plant maintenance mechanics and ground service employees. The transcript of the record made at the NLRB hearing on that petition was, in accordance with inter-agency arrangements, transmitted to the NMB to enable it to make a determination on jurisdiction. On January 30, 1956, the NMB advised the NLRB that, in its opinion, Pan Am's employees at Canaveral were within the coverage of the RLA and that the NMB therefore had jurisdiction over questions affecting their selection of a collective bargaining representative. (App. A, p. 24a). Accordingly, the NLRB dismissed the IAM petition on February 17, 1956. *Pan American World Airways, Inc.*, 115 N. L. R. B. 493 (1956).

The IAM thereupon requested argument before the NMB on the question of RLA coverage of Pan Am's employees at Canaveral. After argument, the NMB, on

July 10, 1956, reaffirmed its opinion to the NLRB of January 30, 1956—that the purposes and the language of the RLA required that Pan Am and its employees at Canaveral be treated as carrier and employees under the Act. (NMB File No. C-2202). (App. A, pp. 23a-31a).

The IAM then applied to the NMB to sever from the previously certified system-wide "craft or class" of Pan Am's mechanics and ground service employees, those employed at Canaveral, and to consider them as a separate "craft or class". After a public hearing, the NMB, on November 9, 1956, dismissed the IAM application. (NMB File No. C-2505). It affirmed once again that the employees involved were subject to the RLA, that it had jurisdiction over the representation dispute, and held that the previously established system-wide "craft or class" of Pan Am's mechanics and ground service employees, of which the TWU had been designated the exclusive bargaining representative, included those at Canaveral as well as at other Pan Am stations. (App. A, pp. 32a-39a).

The IAM and some of the Canaveral employees brought suit in the United States District Court for the District of Columbia against Pan Am, the NMB and NLRB, for a declaration that the RLA was not applicable to, and that the NMB had no jurisdiction over, Pan Am's Canaveral employees.[6] On motion for summary judgment, the District Court, on June 17, 1957, rendered judgment for the defendants, holding that the RLA was applicable, and that "the asserted jurisdiction of the National Mediation Board is not only lawful but compulsive." *Biswanger* v. *Boyd*, Civil No. 4496-56, 32 CCH Labor Cases ¶ 70,840 (not officially reported).

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[6]The IAM withdrew from the action before decision and it was prosecuted by the individual plaintiffs. The TWU became a party by intervention.

As a consequence of the NMB's decision and its affirmance by the District Court, which was binding on it and TWU, Pan Am has continuously treated with TWU as the exclusive representative of Pan Am's employees, in the craft or class of mechanics, wherever employed throughout the United States. (App. C, p. 60a). Thus, Pan Am's airline and maintenance mechanics and its ground service employees, wherever employed in the United States, whether at airline stations, Canaveral, Fort Huachuca or NRDS, have been and are covered by a single system-wide agreement with TWU, providing rules, rates of pay and working conditions uniformly applicable to all such employees. (R. 9; App. C, pp. 54a-55a; 60a).

2. *Pan Am's NRDS Employees.* By petition dated July 11, 1963 (R. 235-36), local unions at Las Vegas, Nevada, affiliated with the Hotel and Restaurant Employees & Bartenders Union, International ("H&RE") (including respondent Culinary Workers Union, Local Union 226), sought certification under the National Labor Relations Act as the exclusive representative of a unit of employees including a small number of Pan Am's NRDS ground service employees, although they were apparently within the system-wide class or craft certified by the NMB, covered by Pan Am's system-wide agreement with TWU.[7] On July 22, 1963, TWU so informed the NMB. (R. 201).

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[7] The NRDS employeees of Pan Am whom the "Culinary Workers" sought to include within the proposed unit perform custodial services as do other ground service employees at Canaveral and the airline stations.

On December 5, 1963, after the decision and judgment of the Court of Appeals, the respondent Building & Construction Trades Council also filed a petition with the NLRB seeking certification as the representative of the greater number of other Pan Am employees at NRDS classified as mechanics and ground service employees and also apparently covered by the NMB's system-wide class or craft determination and Pan Am's corresponding contract with TWU.

The NMB immediately notified the NLRB and the H&RE of the TWU's advice and informed all parties that past precedent indicated that it had jurisdiction over Pan Am's NRDS employees but that it was "prepared to hold [a] prompt hearing on [the] question of its jurisdiction." (R. 202-03).

On July 29, 1963, the NMB informed Pan Am, TWU, the NLRB, and H&RE that it regarded the controversy as one calling for clarification of its 1950 certification of TWU (as the representative of the class or craft of mechanics), as "amplified relevantly" on November 9, 1956 (holding the 1950 certification applicable to Pan Am's employees at Canaveral), and announced that it would hold a hearing on the matter after notice to all interested parties. (R. 204). On July 30, 1963, Pan Am informed the NMB of picketing at NRDS, with severe consequences to the operations there carried on, and having an apparent purpose of forcing acceptance of the respondent Building & Construction Trades Council ("B&CTC") as the representative of certain of Pan Am's employees there. The NMB made the B&CTC a party to the proposed hearing. (R. 205).

Upon notice to all parties, the NMB held hearings at Las Vegas on August 20 and 21, 1963 on the question of its jurisdiction, under the RLA, over questions of representation affecting Pan Am's mechanics and ground service employees at NRDS.[8] On October 29, 1963, the NMB con-

[8]The parties who appeared and participated at the hearing before NMB Member Howard Gamser were: TWU, respondent B&CTC, and its affiliated local unions (all of which are respondents herein); respondent International Brotherhood of Teamsters, and its local union in Las Vegas; H&RE and respondent Culinary Workers Union, Local Union 226; the Building & Construction Trades Department of the AFL-CIO; and the Brotherhood of Railway and Steamship Clerks. In addition, in the words of the NMB, "Pan Am and the AEC "were permitted to participate to the extent of furnishing the Board with technical advice and guidance." (App. A, p. 41a).

cluded (NMB File No. C-3367) that Pan Am and its mechanics and ground service employees at NRDS "are respectively a carrier and employees within the meaning of the Railway Labor Act", and that the NMB has jurisdiction. (App. A, pp. 40a-43a). The NMB deferred consideration of the applicability of current certifications, or class or craft determinations, until raised by "proper application under the statute." (App. A, pp. 42a-43a).

Proceedings Below: Application For Injunction Against Respondents' Activities.

On July 31, 1963, after respondents began picketing at NRDS apparently to procure recognition as the bargaining representatives of Pan Am's NRDS mechanics and ground service employees and to affect their terms of employment, contrary to the procedures and provisions of the RLA governing representation (45 U. S. C. § 152 Ninth), and changes of employment terms (45 U. S. C. § 152 Seventh, § 156), Pan Am began this action to enjoin such violations of the RLA. (R. 12, 21; App. A, p. 22a). On that day, the United States District Court for the District of Nevada, after notice and argument, granted Pan Am's application for a temporary order restraining the picketing and other activities violating the Act, which then ceased. After hearing on August 2, 1963, the District Court denied Pan Am's motion for a preliminary injunction, upon the sole ground that the RLA does not apply to Pan Am employees at NRDS.[9] (App. A, p. 22a). The District Court, however, acknowledging the novelty and importance of the question, and the seriousness of the injury to the government's as well as to Pan Am's interest, were the picketing to be resumed,

[9]The court said that it would, otherwise, "readily enjoin picketing in this labor dispute, which appears essentially to be a jurisdictional dispute. . . ." (App. A, p. 22a).

continued the restraining order pending application by Pan Am to the United States Court of Appeals for the Ninth Circuit for an injunction pending appeal. (R. 319).

On August 15, 1963, the Court of Appeals, on Pan Am's application and after extensive argument before a bench consisting of Judges Hamlin, Koelsch and Browning, granted an order enjoining picketing and similar activities pending hearing and determination of the appeal. (R. 346-47). The appeal was argued on October 10, 1963 before Judges Hamlin, Browning and Madden. When, on October 29, 1963, the NMB decided that the RLA was applicable to Pan Am's employees at NRDS (App. A, pp. 40a-43a), that decision was called to the court's attention. On November 5, 1963, the Court of Appeals affirmed the District Court's denial of the preliminary injunction on the sole ground that the RLA is not applicable to Pan Am's NRDS employees and that the Norris-LaGuardia Act, 29 U. S. C. §§ 101-115 (1958), deprived it of jurisdiction to grant the injunction.[10]

Reasons for Granting the Writ

1. In deciding who are "employees" under the Railway Labor Act, a question of paramount importance to the administration of that Act, the Court of Appeals, contrary to the applicable decisions of this Court, failed to give weight to prior decisions of the National Mediation Board, the body charged with the Act's administration.

Pan Am urged below that the decisions of the NMB rendered in the course of its administration of the RLA—that the purposes of the Act require that Pan Am and its

[10] On December 3, 1963, Pan Am applied for and obtained an order staying the mandate of the Court of Appeals and continuing in effect the injunction previously issued by that Court, pending the filing and disposition of this petition. (R. 397-400).

space site employees should not be excluded from RLA coverage—decisions under which Pan Am and the various unions with which it deals have continuously acted for the past seven years, should be given great weight. The Court of Appeals gave them no weight at all.

Judge Madden's opinion for the Court of Appeals quoted merely a fragment of the 1956 NMB determination which it said, "we confess with deference, does not seem persuasive to us" (App. A, p. 12a); and then incorrectly paraphrased what the Board had said:

> "In short, the NMB's stated view was that if an employee works for an airline as a pilot, a ground crew member, or a bench worker in the airline's shoe factory having no remotest relation to its business as an air carrier, he is governed by the . . . [RLA] . . . ." (App. A, p. 12a)

This was a distortion of the NMB's opinion. For it was not the NMB's "stated view" that a bench worker in a shoe factory hypothetically owned by Pan Am "having no remotest relation to its business as an air carrier" is subject to the RLA. The NMB had expressed no view respecting a hypothetical bench worker in a hypothetical shoe factory. The view the NMB had expressed in 1956 was in respect to Pan Am's mechanics and ground service employees at Canaveral, and in 1963, in respect to similar employees at NRDS, who, the NMB found, perform work substantially identical to work performed at Pan Am's airline stations. It was the NMB's view that such employees were, for purposes of the RLA, subject to that statute's provisions *because* there *was* a relation between those activities and Pan Am's air service. It defined that relationship as the common interests shared by Pan Am's space site and airline station employees because they perform the same kind of work for the same employer, under common policy directives of

the same corporate officials. It pointed to the danger, which its experience in the administration of the Act led it to believe was genuine and probable, that a dispute and strike involving the space site employees might spread to or be supported by airline station employees, with the consequent threat of disruption in Pan Am's air commerce.

In a footnote, Judge Madden said that the current NMB decision as to the NRDS employees did not persuade the court to change its opinion which had been written prior to receipt of that decision. (App. A, p. 15a).

In failing to give weight to the NMB decisions on so important a question in the administration of the Act, and in failing to respond to the reasons offered by the NMB for holding the view it had expressed (not the hypothetical view it had not), the Court of Appeals acted contrary to the clear and established doctrine of this Court that reasoned determinations as to the reach of a statute by an agency charged by Congress with its administration are entitled to the greatest weight. *E.g., United States* v. *Drum*, 368 U. S. 370 (1962); *NLRB* v. *E. C. Atkins & Co.*, 331 U. S. 398 (1947); *NLRB* v. *Hearst Publications, Inc.*, 322 U. S. 111 (1944); *Gray* v. *Powell*, 314 U. S. 402 (1941).

In *NLRB* v. *Hearst Publications, Inc., supra*, this Court reversed the Court of Appeals for the Ninth Circuit for having failed to accord suitable weight to a decision by the NLRB that certain workers were "employees" within the meaning of the National Labor Relations Act. Here, as there, the Court of Appeals failed to give weight to a similar decision by the National Mediation Board, of a similar question under the RLA, a cognate statute. Indifference to such an administrative determination is particularly inappropriate on an application for a preliminary injunction which does not present to the court the record from which that determination was distilled.

2. In holding, contrary to the NMB, that the RLA does not apply to non-transportation employees of an air carrier who do work substantially identical to that of the carrier's transportation employees with whom they share common interests, the Court of Appeals wrongly decided an important question of federal law which has not been, but should be, settled by this Court.

A. The NMB Decisions.

In 1956, the NMB was called upon to determine whether, to achieve the aim of Congress to avoid interruptions to air commerce, Pan Am's mechanics and ground service employees at Canaveral, who were not engaged in air transportation activities, should be excluded from the dispute-settling procedures of the RLA. It held that if the Congressional purpose were to be accomplished, they should not be. Its reasons were given in the course of a thoughtful opinion, based on its experience in administering the statute:

> "The kind of work the employees perform [at Canaveral] is identical with the work performed by other employees of the same craft at the regular established [airline] bases of [Pan Am]. The departmental organization of [Pan Am] at the Missile Base is similar to that in effect on the other divisions of [Pan Am] and the executive controls from headquarters are the same as on other divisions." (App. A, p. 29a).

In the NMB's view, the "principal question"[11] was:

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[11] Earlier in its opinion, the NMB had quite properly looked to the words of the statute as indicative of its coverage: "Is the employer a common carrier by air engaged in interstate commerce? Does the individual perform any work as an employee? If both answers are in the affirmative, the Board's jurisdiction is clear." (App. A, p. 28a). That statement follows the express words of 45 U. S. C. § 181 which makes applicable pertinent provisions of the RLA to air carriers and their employees. (See note 13, *infra*). But as the Board later made plain in its opinion, this initial test was

> "whether the employees at [Canaveral] are engaged in activity so remote from the activity of the employer, as a carrier by air, that it may reasonably be said that the purposes of the [RLA] will be achieved in the event such employees are excluded from the jurisdiction of the Act." (App. A, p. 30a).

In resolving that question against the exclusion of the employees from the Act's coverage the Board said, in part:

> "Suppose the position of the [IAM] is adopted and the employees at the Missile Base are held not to be under the [RLA]; and further suppose that sometime hereafter a labor dispute arises between such employees and [Pan Am], and a strike is threatened with attendant picket lines. If picket lines were then to be established, it is reasonable to suppose that the main offices and air bases would be picketed. What effect would such picketing have upon the function of [Pan Am] as a common carrier of persons or property?
>
> "It is the express purpose of the [RLA], to avoid any interruption to commerce or to the operation of any carrier engaged therein and to accomplish such purpose the Act provides a number of steps that may be required of the parties for the protection of the public. If these employees are deemed to be excluded from the Act, then in the face of a serious labor dispute, the [NMB] would not be in a position to proffer its mediatory services under Section 5 of the [RLA]; and if a labor dispute persisted and threatened to substantially interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service, then the [NMB] could not notify

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not the primary basis for its decision. Yet the Court of Appeals summarized the NMB decision as turning exclusively on that portion of its opinion (App. A, p. 12a), and did not discuss at all the substantial reasons given by the Board for its interpretation of the statute.

the President so that he might create an emergency board, as provided in Section 10 of the [RLA].

> In the light of the purposes of the [RLA] to insure to the public, to the employees and to employers a means of settling disputes of the employees as to who may represent them for collective bargaining purposes and to settle disputes . . . so as to avoid interruption to commerce, we must conclude that the relationship of employees performing the functions that are performed for [Pan Am] at [Canaveral] by its employees is not so tenuous and remote as to remove them from the jurisdiction of the [RLA]." (App. A, pp. 30a-31a).

Since Pan Am's employees at NRDS perform services "substantially identical" (App. A, p. 11a) to those rendered by its Canaveral employees, the 1956 NMB decision and its careful explication have equal relevance to NRDS.

Until the District Court in this case rendered its decision on August 2, 1963, the NMB's construction of "employee", as used in the Act, to cover carrier employees other than those directly engaged in transportation, had not been disturbed or in any respect challenged by any court or administrative agency. It was affirmed by the District Court for the District of Columbia, (*Biscaniger v. Boyd, supra*), accepted by the NLRB,[12] and by carrier and unions. And after the decision of the District Court herein, the NMB re-affirmed its earlier determination when, on October 29, 1963, it held that Pan Am's employees at NRDS are subject to the RLA, saying, in part:

> "The activities on which these employees of the carrier, who are based at the Nevada Test Site, are engaged have such a functional relationship to the

[12] The NLRB had at an early date deferred to the jurisdiction of the NMB. *Pan American World Airways, Inc.*, 115 N. L. R. B. 493 (1956).

over-all operations of this carrier that assertion of jurisdiction is mandated by the statute." (App. A, p. 42a).

B. The Court of Appeals' Grounds For Rejecting the NMB's Construction of the RLA Do Not Respond to the NMB's Reasons.

Starting with the express words of Section 181 of the RLA which extends the statute to *all* employees of an air carrier, but basing its decisions primarily upon what, in view of its experience under the Act, would best effectuate the statutory purposes, the NMB determined in its 1956 decisions and in its current decision as to Pan Am's NRDS employees that those purposes would be subverted were such employees to be excluded from the express coverage of the Act.[18] The Court of Appeals did not directly review this most recent decision of the NMB nor, of course, the earlier decisions of 1956. It has nevertheless disapproved their result, and on grounds not addressed to the Board's reasons set forth at length in its 1956 decisions (App. A, pp. 23a-39a). The court below excluded all non-transportation employees from the coverage of the RLA although, as the NMB has found, many such employees, by their relationship to transportation employees may affect the maintenance of transportation services. The grounds on which the court below relied do not support such a limited construction of employees subject to the Act:

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[18] 45 U. S. C. § 181 extends the coverage of the RLA, in broad terms, to "every" air carrier and "every . . . person who performs any work as an employee . . . of such carrier. . . ." 45 U. S. C. § 182 incorporates, in terms, the broad coverage of § 181 into the prior provisions of the RLA prescribing "duties, requirements, penalties, benefits, and privileges". Thus, contrary to the suggestion of the court below (App. A, pp. 4a-5a, 7a-8a) the scope of § 181 is not limited by § 151; rather, the definitions of § 151 are expanded to include the coverage of § 181.

1. *NRDS is not a shoe factory and its mechanics and ground service personnel are not shoemakers.* The opinion of the Court of Appeals, after stating that Pan Am's operations at NRDS had "nothing to do with transportation by air or by rail," says:

> "It would seem, then, that the same problem of interpretation and application of the pertinent statutes would be presented, if Pan American's management had acquired and were operating a shoe factory for profit." (App. A, p. 6a).

It goes on to say:

> "The purpose of the restrictive provisions of the Railway Labor Act is to keep transportation moving. If the Act has the effect of keeping employees in a shoe factory working against their will, it would seem that the effect of the Act is not coincident with its purpose." (App. A, p. 7a).

Whether application of the procedures of the RLA to nonexistent shoe factory employees in a nonexistent shoe factory could reasonably be said to be necessary to avoid interruption of air commerce is not an issue in this case and has never, so far as we know, been an issue before the NMB. The NRDS employees in this case are mechanics and ground service employees doing, in the main, the same work as Pan Am's other mechanics and ground service employees at its airline bases. In the administration of labor statutes, similarity of work and community of interest have been made the basis for many determinations by administrative bodies and courts.[14] There would seem to be no need, therefore, to belabor the plain impropriety of deciding a question of statutory construction such as is involved here by starting

[14] See, *e.g.*, *Walling* v. *Taycffort, Inc.*, 158 F. 2d 944 (2d Cir.), *cert. denied*, 331 U. S. 851 (1947); *Town & Country Shoes, Inc.*, 101 N. L. R. B. 290 (1952); *Republic Steel Corp.*, 91 N. L. R. B. 904 (1950).

with the assumption that shoemakers employed in shoe factories and mechanics employed at space installations are equivalent, and then, because of the apparent incongruity of applying the statute to "bench workers" who, by unstated premise, do not have common interest with the usual carrier employees, deciding that Congress could not have intended to apply it to mechanics, who do have such common interest.[15]

2. *ICC Section 151 determinations of the work of employees of rail carriers are not instructive as to who are employees of air carriers under Section 181 of the Act.* After noting that Pan Am had referred to a part of Section 151 of the RLA, the Court of Appeals, in support of the limited meaning it gave to "employee", called attention to that part which refers to orders of the Interstate Commerce Commission ("ICC") defining the work of employees of railroads. The opinion then says:

> "We suppose that the Interstate Commerce Commission did not have in effect any orders relating to employees in a shoe factory, even though the shoe factory happened to be owned by a railroad." (App. A, p. 7a).

That comment misconceives the meaning of Section 151, and its application to Section 181. The ICC itself has acknowledged that it is the NMB, not the ICC, which is

[15]The Court of Appeals, in the course of its opinion, said: "Pan American says, obviously correctly, that it is a carrier, hence the person who works in its shoe factory, or in its NRDS enterprise is an employee within the meaning of the RLA." (App. A, p. 7a). In fact, Pan Am has not argued in any of the courts below, and does not argue here, that if it owned a shoe factory, those employees would *ipso facto* be covered by the RLA. If the NMB, however, after hearings, found that such employees did the same work as transportation employees of Pan Am, that common labor policies applied, and that their labor disputes could result in the interruption of air commerce, presumably the NMB would take jurisdiction over them, under the RLA.

empowered by the RLA to determine who are employees under that Act; the ICC's orders only define the kind of work which those who are employees do. *Ore Dock Foremen and Laborers*, 246 I. C. C. 703 (1941). Thus, contrary to the suggestion of the court below, the reference of Section 151 to the ICC does not confine the coverage of the RLA, in the case of rail carriers, to transportation workers. The NMB, on the contrary, has ruled that employees of a railroad, doing work defined in ICC orders, at a ski-lodge, are employees under the RLA. *In the Matter of Representation of Employees of the Union Pac. R. Co. (Sun Valley Operations)*, NMB Case No. R-2111 (1950), 2 Determination of Craft or Class of the National Mediation Board 113. The work there involved included that of mechanics, carpenters, painters and maintenance men, classifications long-established on the railroads, just as the classifications of mechanics and ground service employees at NRDS have been long-established on the airlines.

The Court of Appeals singularly could not find any intent on the part of Congress

> "to lift the employees of our hypothetical shoe factory, or of our actual Nuclear Research [*sic*] Development Station, out of the legal area occupied by most other workmen in the country who do exactly the same work under exactly the same conditions and surroundings, and place them, for employment relations purposes, in the 'state within a state' occupied by railroad and air transportation workers. . . ." (App. A, p. 9a).

It is precisely because the actual NRDS workers, and not the hypothetical shoemakers, do "exactly the same work under exactly the same conditions and surroundings" as the other base maintenance employees of Pan Am at its other stations, and because a dispute affecting them might affect their brothers engaged in the same work at the airline stations, that the NMB thought they were included, for employment relations purposes, under the same statute.

3. *It is the application of the RLA which is involved in this case, not of the FLSA, as in Jackson v. Northwest Airlines.* The case which the Court of Appeals regarded "as directly in point" (App. A, p. 14a) is *Jackson v. Northwest Airlines, Inc.*, 70 F. Supp. 501 (D. Minn. 1947). That case, decided nine years before the NMB Canaveral decision and its affirmance on review,[16] was thought by the NMB and the District Court of the District of Columbia (*Biswanger v. Boyd, supra*) to be quite beside the point.

It did not involve our question—how far, in light of the purposes of the RLA, do the dispute-settling procedures of that statute reach—but the quite different question of how to confine the exemption from the overtime obligations of the Fair Labor Standards Act, ("FLSA"), 29 U. S. C. §§ 201-219 (1958), directed by that statute for employees covered by the RLA, so as to give the fullest play to the beneficent purposes of the FLSA.[17]

Jackson was an action for overtime compensation under the FLSA. The defendant airline argued, among other things, that its employees, engaged in a bomber modification project were, under a provision of the FLSA, [then 29 U. S. C. § 213(a)(4), later § 213(b)(3), as amended in 1949] exempted from its overtime provision as employees of an air carrier subject to the RLA. The District Court

[16]Since 1950, when the Court of Appeals for the Eighth Circuit partially affirmed the District Court, 185 F. 2d 74, and until the courts below relied upon it, *Jackson* had not been followed by any other reported decision. Views contrary to those expressed in *Jackson* had previously been suggested in a number of other decisions. *McComb v. Union Stock Yards & Transit Co.*, 168 F. 2d 375 (7th Cir. 1948); *Keele v. Union Pac. R. R.*, 78 F. Supp. 678, 683 (S. D. Cal. 1948); *Brittan v. Hudson & Manhattan R. R.*, 50 F. Supp. 37 (S. D. N. Y. 1943).

[17]Contrary to the statement of the opinion below (App. A, p. 13a), the RLA did not provide "for overtime for work above 48 hours"; exclusion of employees from the FLSA overtime provisions, on the ground that they were under the RLA, would therefore have meant no such coverage for them.

said that the exemption did not apply; the basis of its decision[18] was that:

> "Broadly and literally construed, the [exemption] provision may sustain the latter meaning, as defendant [airline] contends. But it is well settled that the exemption provisions of the Wage and Hour Act must be construed strictly, not broadly, and that its remedial provisions must be construed liberally, so that the [Wage and Hour] Act's words will accomplish the purpose at which the Act is aimed." 70 F. Supp., at 504. See also, 185 F. 2d 74, at 77.

It may have been proper to give a strict construction to the RLA exemption to the overtime provisions of the FLSA, at a time when there was no contrary determination of RLA coverage, in order to effectuate the "remedial provisions" of the FLSA, where the necessary consequence of not doing so would be to deprive the employees of all statutory protection in respect to overtime. But it cannot follow from that, as the court below thought it did, that the coverage of the RLA in this case is to be similarly confined. The objective here is not application of the remedial provisions of the FLSA, achievable only by a narrow construction of its exemption provision, but application of the remedial provisions of the RLA, which the NMB believes is required by that Act's avowed purpose and a plain reading of its words. The consequence of such application is not the deprivation of statutory protection but the substitution of one set of statutory procedures (RLA) for another (NLRA).[19]

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[18] *Jackson* was affirmed in part and reversed in part, *sub nom. Northwest Airlines, Inc.* v. *Jackson*, 185 F. 2d 74 (8th Cir. 1950). A petition for certiorari by the plaintiff—not the carrier—*solely* on the question of the applicability of the Portal-to-Portal Act of 1947 was denied. 342 U. S. 812 (1951).

[19] The only other decision relied upon by the Court of Appeals was *Northwest Airlines, Inc.*, 47 N. L. R. B. 498 (1943), in which the NLRB dismissed, for lack of jurisdiction, a certification petition

Effect of the Court of Appeals Decision.

The nature of Pan Am's labor relations with all its employees over the past seven years has been compelled by the consistent NMB decisions. Pan Am has, under the RLA, applied its system-wide contract with TWU (and other system contracts with other unions) to its NRDS employees as well as to its employees at Canaveral, Fort Huachuca, and its airline stations. The NMB's determination that the RLA is applicable to Pan Am's NRDS employees and that the Board has jurisdiction over them has not been directly reviewed by any court and must therefore be presumed to be in full force and effect. Accordingly, Pan Am is bound in law to continue to discharge its many statutory obligations under the RLA both for its NRDS and its airline station employees. See, *e.g.*, 45 U. S. C. §§ 152, 156-158, 160, 184. (App. B, pp. 45a-49a, 51a).

The Court of Appeals has not reviewed, but only disagreed with, the prior NMB decisions. That court believes that the National Labor Relations Act, not the Railway Labor Act, governs Pan Am's labor relations at NRDS, and presumably at other space sites. This Court should review the judgment below in order that the applicable law be finally and definitively determined, and the irreconcilable

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filed by the UAW for a unit of Northwest Airlines' bomber modification employees. The NLRB said that since the NMB had not declined to assume jurisdiction in the case, it (the NLRB) would not undertake to assert jurisdiction. 47 N. L. R. B., at 501-02. On rehearing, the NLRB adhered to its previous decision, 51 N. L. R. B. 1012 (1943), and said, as a further reason why it could not assert jurisdiction, that "the [airline's] project is so integrated with its carrier activities as to preclude a finding that the project is a separate and distinct enterprise." 51 N. L. R. B., at 1015. Significantly, the NMB here has found that "the activities [at NRDS] have such a functional relationship to the over-all operations of [Pan Am] that assertion of jurisdiction is mandated by the [RLA]." (App. A, p. 42a). And in 1950, the NMB said that "[the Canaveral project] is part and parcel of [Pan Am] . . . ." (App. A, p. 38a).

disparity between the court below and the NMB resolved. Indeed, there seems to be no other way in which this significant conflict can be determined, for, despite the decision of the court below that the RLA does not apply to a carrier's non-transportation employees,[20] the NMB has decided that it does, has asserted its jurisdiction over Pan Am's NRDS employees and, presumably, will continue to do so.

Conclusion

For the reasons stated, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Dated: New York, New York
January 3, 1964

Respectfully submitted,

JESSE FREIDIN
Attorney for Petitioner

MURRAY GARTNER,
RICHARD H. BOROW,
Of Counsel

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[20] The question has significance to all carriers, rail and air. For example, the NMB has held that powerhouse employees, automotive mechanics, maintenance mechanics, carpenters, painters, upholsterers, and maintenance and engineering employees, all employed by the Union Pacific Railroad Co. at its ski-lodge operations at Sun Valley, Idaho, are employees within the scope of the RLA, and that the NMB has jurisdiction over representation disputes affecting them. *In the Matter of Representation of Employees of the Union Pac. R. Co. (Sun Valley Operations)*, NMB Case No. R-2111 (1950); 2 Determination of Craft or Class of the National Mediation Board 113. The record of that proceeding shows that those employees were not engaged in transportation, but were exclusively employed in and around the ski-lodge maintained by the railroad.

APPENDIX A

Judgment of the Court of Appeals

United States Court of Appeals

FOR THE NINTH CIRCUIT

PAN AMERICAN WORLD AIRWAYS, INC.,
Appellant,

vs.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, etc., et al.,
Appellees.

No. 18,822

APPEAL from the United States District Court for the District of Nevada.

THIS CAUSE came on to be heard on the Transcript of the Record from the United States District Court for the District of Nevada and was duly submitted.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court, that the judgment of the said District Court in this Cause be, and hereby is affirmed.

Filed and entered November 5, 1963.

Appendix A

Opinion of the Court of Appeals

United States Court of Appeals

FOR THE NINTH CIRCUIT

PAN AMERICAN WORLD AIRWAYS, INC.,
Appellant,

vs.

UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, etc., et al.,
Appellees.

No. 18,822
Nov. 5, 1963

Appeal from an order of the United States District Court for the District of Nevada

Before: MADDEN, Judge of the Court of Claims, and HAMLIN and BROWNING, Circuit Judges.

MADDEN, Judge of the Court of Claims:

This is an appeal from an order of the United States District Court for the District of Nevada, denying the plaintiff Pan American's motion under Rule 65 of the Federal Rules of Civil Procedure for a preliminary injunction against the defendant Brotherhood's labor organization and certain individually named respondents restraining them from striking, picketing, and otherwise interfering with Pan American's operations at the Nuclear Research Development Station (NRDS) at Jackass Flats, Nevada.

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If the labor law applicable to Pan American's enterprise at this location was the ordinary federal law applicable to most industrial enterprises of substantial size, the District Court was right in denying the injunction because the Norris-La Guardia Act, 29 U. S. C. § 101 *et seq.*, forbids the issuance of an injunction in cases of labor disputes in such enterprises, in the circumstances of this case. Pan American's contention is that the generally applicable labor law did not apply to its situation; that the special provisions of the federal Railway Labor Act, 45 U. S. C. § 151 *et seq.*, were the applicable law in its case, and that under that law it was entitled to its injunction. If Pan American is correct as to which law is applicable, the injunction should have been granted.

The District Court, though denying the motion for a preliminary injunction, granted a ten-day stay to preserve the status quo pending Pan American's appeal to this court. Rule 62(c) Fed. R. C. P. The appeal was taken in time under 28 U. S. C. 1292(a)(1); and Pan American made a motion in this court for an interlocutory injunction pending appeal, under 28 U. S. C. § 1651(a) and Rule 62(g) Fed. R. C. P. The motion was granted, and the appeal has now been heard.

The Railway Labor Act, which Pan American says is the applicable law in this case, when it was enacted in 1926, applied only to railroads. This original part of the Act is in 45 U. S. C. §§ 151-163. In 1936 the Act was amended to include carriers by air. The added sections are §§ 181-188 of 45 U. S. C. Sections 181 and 182 provide:

> § 181. All of the provisions of sections 151, 152, and 154-163 of this title are extended to and shall cover every common carrier by air engaged in interstate or

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foreign commerce, and every carrier by air transporting mail or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers . . . .

§ 182. The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 151, 152 and 154-163 of this title shall apply to said carriers by air and their employees in the same manners and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

The reference to section 151 and the other sections of the original act requires that the coverage of the original act be kept in mind in determining the coverage of the new air carrier sections.

Section 151 of 45 U. S. C. in its first paragraph, which is section 1, First, of the Act, says:

First. The term "carrier" includes any express company, sleeping car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad . . . .

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So the Railway Labor Act applies to every carrier by railroad which is subject to the Interstate Commerce Act. And Section 1, Fifth of the RLA, 45 U. S. C. 151, Fifth, says:

> Fifth. The term "employee" as used herein includes every person in the service of a carrier . . . who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect . . . .

The Interstate Commerce Act, involved here by the foregoing reference to the orders of the Interstate Commerce Commission says, in section 1; 49 U. S. C.:

> The provisions of this chapter shall apply to common carriers engaged in (a) the transportation of persons or property wholly by railroad.

Because Congress thought it was necessary that railroad transportation of persons and property should not be interrupted by labor disputes, if those disputes could be settled by negotiation and mediation, and certain other procedures, Congress in the Railway Labor Act, 45 U. S. C. §§ 151(a)-160 provided for the creation of various boards, for mediation, arbitration, and finally for Emergency Boards to be appointed by the President, when important transportation service is seriously threatened by labor trouble. At the time of the 1926 legislation, there were no federal labor relations statutes applying generally to industry or other important activities in the United States. Railroad labor was by the Railway Labor Act given certain advantages over other labor, but it was subjected to certain restraints, and strikes were forbidden unless and until the

mediation and other procedures provided for in the RLA had been followed. If strikes or other labor activities imperiling this continuity of transportation occurred in violation of the RLA, they could be enjoined, the Norris-La Guardia Act excepting such unlawful activities from its prohibition of injunctions.

The air transportation industry was, then, in effect subjected to the labor provisions of the RLA by the 1936 amendments.

In our instant case, Pan American's operation at the Nuclear Research Development Station where the labor troubles with which we are concerned occurred, had nothing to do with transportation by air or by rail. The United States Atomic Energy Commission had in June, 1963, awarded to Pan American a contract for "housekeeping" and general support services at the Commission's station located at its Nevada Test Site at Jackass Flats. Pan American's work was the preventive maintenance of electrical, electronic and ventilation equipment and such technical functions as the storage and use of liquids, fuels and gases. The work is in connection with the development of a nuclear rocket engine to be used for the propulsion of space vehicles.

It would seem, then, that the same problem of interpretation and application of the pertinent statutes would be presented, if Pan American's management had acquired and were operating a shoe factory for profit. Would the employees in that factory be obliged to comply with the waiting periods and mediation provisions of the Railway Labor Act before they would be free to do what the employees in a clothing factory across the street from them

were guaranteed the right to do, viz. to strike if they were not bound by contract not to strike?

The purpose of the restrictive provisions of the Railway Labor Act is to keep transportation moving. If the Act has the effect of keeping employees in a shoe factory working against their will, it would seem that the effect of the Act is not coincident with its purpose. Pan American urges us to keep our attention on the text of the legislation; that the legislation says, in section 1, Fifth, 45 U. S. C. § 151, Fifth:

> The term employee, as used herein includes every person in the service of a carrier.

Pan American says, obviously correctly, that it is a carrier, hence the person who works in its shoe factory, or in its NRDS enterprise is an employee within the meaning of the RLA. Even literally and textually the matter is not quite that simple, because the section says more than we have quoted above: It says:

> The term employee, as used herein includes every person in the service of a carrier * * * who performs any work defined as that of an employee * * * in the orders of the Interstate Commerce Commission now in effect.

We suppose that the Interstate Commerce Commission did not have in effect any orders relating to employees in a shoe factory, even though the shoe factory happened to be owned by a railroad.

The defendants point to § 151, hereinbefore quoted, which defines the word "carrier" as used in the RLA as including not only railroads themselves, but

> any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration, or icing, storage and handling of property transported by railroad * * *.

The statute thus made certain that railroads could not escape the application of the statute to activities closely related to railroad transportation, by having those activities carried on by subsidiary or controlled enterprises. Here the attention of the statute was upon transportation and activities accessory to transportation. Would Congress at the same time and in the same statute, in § 151, Fifth, have intended to make the coverage of the word "employee" in the Act depend, not at all upon the employee's relation to transportation, but upon the logically irrelevant fact that his employer owned a railroad, in addition to the shoe factory in which the "employee" worked?

There are two quite different bodies of federal labor law, the law of the Railway Labor Act for railroad and airline employees, and the law of the National Labor Relations Act and the Fair Labor Standards Act for most other employees.

The Supreme Court of the United States said in California v. Taylor, 353 U. S. 553 at pages 565 and 566:

> The Railroad Labor Act is essentially an instrument of industrywide government. See Elgin, J. & E. R. C. v. Burley, 325 U. S. 711, 749, 751, 89 L. Ed. 1886, 1908.

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1909, 65 S. Ct. 1282 (dissenting opinion). The railroad world for which the Act was designed has been described as 'a state within a state.' Its population of some three million, if we include the families of workers, has its own customs and its own vocabulary, and lives according to rules of its own making.

* * * *

Congress has not only carved this singular industry out of the Labor Management Relations Act of 1947, 61 Stat. 156, 29 USC § 182, but it has provided, by the Railway Labor Act, techniques peculiar to that industry. An extended period of congressional experimentation in the field of railway labor legislation resulted in the Railway Labor Act and produced its machinery for conciliation, mediation, arbitration, and adjustments of disputes.

An intent on the part of Congress to lift the employees of our hypothetical shoe factory, or of our actual Nuclear Research Development Station, out of the legal area occupied by most other workmen in the country who do exactly the same work under exactly the same conditions and surroundings, and place them, for employment relations purposes, in the "state within a state" occupied by railroad and air transportation workers, would be so incongruous as to suggest that there must be some reason, though not readily apparent, why Congress entertained such an intent.

Research of counsel has produced no such reason, and has left us facing the problem of whether a highly specialized and distinct set of labor laws tailor-made for employees engaged in transportation of persons and goods should be

applied to other employees having nothing whatever to do with the transportation of persons and goods. We do not have here a problem of determining whether the relationship of these employees to transportation is "tenuous," "remote" or "negligible."* In our case the relationship is non-existent. If, then, these employees are governed by the Railway Labor Act, it is because Congress has said that they should be so governed. That is what Pan American urges. But our analysis of the pertinent statutes earlier in this opinion convinces us that Congress has not said that so unequivocally as to leave no room for an interpretation of the statutes which will produce a reasonable, and not a merely arbitrary result.

We suggest, in passing, that the defendant unions see somewhat more relevance to our problem than we do in the Supreme Court's decision in the Virginian Railway case. That case was decided on March 29, 1937. The question was whether the federal statute, the Railway Labor Act, was applicable to the "back-shop" employees of the railroad who kept the railroad's engines and equipment in repair so that they could be returned to use in transportation. The Court was, as Pan American says, dealing with a question, not of statutory interpretation, not of deciding whether one federal statute rather than another was applicable to these back-shop employees, but whether the federal Commerce Power was broad enough to permit Congress to regulate these back-shop labor relations at all. To be sure, the Supreme Court two weeks later, on April 12, 1937, issued its decision in the case of *National Labor Relations*

*See Virginian R. Co. v. System Federation, 300 U. S. 515, 57 S. Ct. 592, L. Ed.

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Board v. *Jones and Laughlin Steel Co.*, 301 U. S. 1, giving such a broad scope to the Commerce Power as to remove any doubt with regard to federal power in such a situation as that in *Virginian*. But at the time of the decision in *Virginian* it was necessary to show the substantial tangible relation between the back-shop work and the movement of trains in commerce, in order to satisfy the then existing requirements of Constitutional doctrine.

There has been some litigation involving questions at least analogous to our question. In Northwest Airlines, Inc., 47 NLRB 498 (1943) the National Labor Relations Board said:

> * * * We therefore reject the foregoing argument of the Company, which would lead to the result that all activities of a concern are exempt from the provisions of the Act (the National Labor Relations Act) if it (the Company) operates to any extent, however incidental, as a carrier by air.

The NLRB held, however, that in that case there was some substantial relation between the airline's activities there involved and its transportation functions, and therefore, since the National Mediation Board had not waived jurisdiction, dismissed the case.

In 1955 a union filed a petition with the NLRB for an election among Pan American's employees at Cape Canaveral, Florida, who performed work substantially identical with that performed at the Nuclear Research station in Nevada, involved in our instant case. The NLRB conducted a hearing upon the petition and then submitted the transcript of its proceedings to the National Mediation

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Board, the agency which administers the Railway Labor Act. The NMB advised the NLRB that in its opinion the Canaveral operation of Pan American was within the scope of the Railway Labor Act, and that the NMB therefore had jurisdiction over it. The NLRB acquiesced in the NMB's claim of jurisdiction and dismissed the union's petition. It said, 115 NLRB 493:

> We, therefore, affirm our opinion in Northwest Airlines, Inc. [47 NLRB 498 (1943)] that unless the NMB definitely declines to assume jurisdiction over such disputed airline employees, the Board will not assert jurisdiction. Accordingly we shall dismiss the petition.

The union there involved then argued before the NMB that the RLA was inapplicable. The NMB rejected the argument, in a long opinion, NMB File No. C-2202, which, we confess with deference, does not seem persuasive to us. In the course of the opinion the NMB said:

> The test is simple: Is the employer a common carrier by air engaged in interstate commerce? Does the individual perform any work as an employee? If both answers are in the affirmative, the Board's jurisdiction is clear.

In short, the NMB's stated view was that if an employee works for an airline as a pilot, a ground crew member, or a bench worker in the airline's shoe factory having no remotest relation to its business as an air carrier, he is governed by the distinctive set of labor laws written in the Railway Labor Act and administered by the National Mediation Board.

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The union in the Canaveral case and some of its members sought declaratory and injunctive relief against the assumption of jurisdiction by the NMB, in the United States District Court for the District of Columbia. That court dismissed their suit, in the case of Biswanger v. Boyd, 32 CCH Labor cases ¶ 70,840, saying, *inter alia*:

> The Court therefore concludes that the Act (RLA) is applicable and the asserted jurisdiction of the National Mediation Board is not only lawful but compulsive.

In the courts, the most significant litigation occurred in the Eighth Circuit. In the case of Jackson v. Northwest Airlines, 70 F. Supp. 501 (1947) the United States District Court for the District of Minnesota, in an opinion by Judge Nordbye, held that the Fair Labor Standards Act, and not the Railway Labor Act, applied to the length of the work week of employees who worked for an airline but whose work had no relation to air transportation. The FLSA provided for overtime pay for work above 40 hours in a week. The RLA provided for overtime for work above 48 hours. The FLSA, in its section 13(a), 29 U. S. C. § 213(b), says that its provisions shall not apply * * * to (4) any employee of a carrier by air subject to the provisions of title II of the Railway Labor Act.

The question before the court in the Northwest Airlines case was the question which is before us. The Fair Labor Standards Act, like the National Labor Relations Act, applies to the generality of labor in the United States. The FLSA covers the subjects of wages, hours of work and conditions of employment. The NLRA covers the subjects of union organizations, collective bargaining, the proper bargaining unit and the selection of the representative union.

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Both these generally applicable statutes are important charters of rights of working people. The Railway Labor Act is also an important charter for working people, but it is specially made for those who work in the transportation industry, and is so made for the purpose of assuring that transportation may not be interrupted.

We regard the District Court's decision in Northwest Airlines as directly in point. In further proceedings in the District Court, the court, 76 F. Supp. 121, rejected Northwest's asserted defense that its failure to comply with the FLSA was due to reliance upon an administrative ruling of an agency of the United States, a defense authorized in proper cases by the Portal to Portal Act.

Northwest Airlines appealed to the United States Court of Appeals for the Eighth Circuit. The court in Northwest Airlines v. Jackson, 185 F. 2d 74 (1950), approved the District Court's conclusion that the Railway Labor Act did not apply to Northwest's non-transportation activities, but reversed the District Court's determination that Northwest did not have a defense under the Portal to Portal Act.

In the Court of Appeals' opinion in Northwest Airlines this language from the District Court's opinion is quoted with approval:

> The Railway Labor Act was intended to apply only to transportation activities and that work which bears more than a tenuous, negligible and remote relationship to the transportation activities. It was not intended to apply to all work, regardless of its connection to transportation, merely because the company carrying on the

work included carrier activities within its company functions.

This opinion, already too long, will not be extended by a discussion of the numerous other precedents cited by the parties. None of them are very pertinent to our problem.

The order of the District Court is affirmed.**

(Endorsed) Opinion Filed Nov. 5, 1963.

Frank H. Schmid, Clerk.

**After the foregoing opinion was written, the court was advised that the National Mediation Board, on October 29, 1963, decided that it was required by the Railway Labor Act to assert jurisdiction over the project involved in this litigation. The Board stated no reason for its conclusion except the reason given by it in the Canaveral case, discussed in our opinion. We adhere, therefore, to what we had decided before receiving the advice referred to above.

Appendix A

Opinion of the District Court of August 2, 1963

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

PAN AMERICAN WORLD AIRWAYS, INC., *Plaintiff,* *vs.* UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA; LOCAL UNION 1780, et al. *Defendants.*	Civil 560

FOLEY, District Judge. This is Civil Action No. 560, entitled Pan American World Airways, Inc., versus United Brotherhood of Carpenters and Joiners of America, et al.

Mr. R. L. Yordy, Project Manager of Pan American's Guided Missile Division at the Nevada Test Site, has testified in substance that, under the contract, defendants' Exhibit A in evidence, dated June 28, 1963, between the Space Nuclear Propulsion Office, an agency of the Atomic Energy Commission, and Pan American World Airways, Inc., Pan American had agreed to operate and maintain equipment and facilities and to perform preventive maintenance in regard to the air conditioning facilities, and to do painting and electrical work, employing mechanics and other helpers for such services, and in addition to do certain technical work involving, as I understand it, liquid and gaseous hydrogen and liquid and gaseous nitrogen. He testified that Pan American did not transport passengers, freight or mail to or from the test site, that no aircraft services were being provided, no parts were being produced

or processed, and no flight operations conducted; that his company did not store, service or repair aircraft in any way nor use its own aircraft in flying in and out of the fieldoport at the test site. Mr. Yordy testified further that the contract with the Space Nuclear Propulsion Office of the Atomic Energy Commission calling for Pan American's rendering of support service to the Nuclear Rocket Development Station of the Atomic Energy Commission involved performing the same general services as Pan American does per contract with the United States Air Force at Cape Canaveral, Florida, and Fort Huachuca, Arizona.

The Court indicated at the commencement of the hearing this morning that it should be first determined whether or not the Railway Labor Act was applicable to Pan America's activities at the test site. The defendant unions and members have relied heavily on the case of Northwest Airlines vs. Jackson (1947), decision of the District of Minnesota, 70 Fed. Supp. 501, and the same case on appeal, Northwest Airlines vs. Jackson, a 1951 decision of the Eighth Circuit, reported at 185 Fed. 2d 74, certiorari denied by the United States Supreme Court, 342 U. S. 812.

The ruling of the Northwest Airlines case is that the Railway Labor Act does not embrace activities other than those carrier activities and those related to them, and that modification work performed on army planes by Northwest Airlines under contract with the Government, which work was not necessary to Northwest's continued operation as an airline had such a remote, tenuous and negligible relationship to the transportation activities of the airline that they were not within the Railway Labor Act. The Court rejected the contention that if a carrier is subject to the Railway Labor Act with respect to any of its activities, including its

airline activities, that the Railway Labor Act subjects a carrier to its jurisdiction for all purposes and all activities. The Court held that the Railway Labor Act did not apply to the modification work merely because other activities were subject to the Railway Labor Act. The activity in litigation must be subject to the Act. The Court held that the Act never intended to embrace industries other than carrier activities and those things related to them. This Court has examined and considered the cases of Brittan v. Hudson & Manhattan R. Co., a decision of the Southern District of New York (1943), found in 50 Fed. Supp. 37; Keele v. Union Pacific R. Co., a 1948 decision of the Southern District of California, found in 78 Fed. Supp. 678; and the case of Roland v. United Airlines, a District Court decision of the Northern District of Illinois (1947), reported at 75 Fed. Supp. 25.

The Supreme Court of the United States in the case of Virginian R. Co. v. System Federation, a 1937 decision, 300 U. S. 515, 81 Law Ed. 789, a case wherein the status of back shop employees, whether or not they were under the Railway Labor Act, was in question. The Court stated, in part:

> "The activities in which these employees are engaged have such a relation to the other confessedly interstate activities of the petitioner that they are to be regarded as a part of them. All taken together fall within the power of Congress over interstate commerce. (Citing cases.) Both courts below have found that interruption by strikes of the back shop employees, if more than temporary, would seriously cripple petitioner's interstate transportation. The relation of the back shop to transportation is such

that a strike of petitioner's employees there, quite apart from the likelihood of its spreading to the operating department, would subject petitioner to the danger, substantial, though possibly indefinable in its extent, of interruption of the transportation service. The cause is not remote from the effect. The relation between them is not tenuous. The effect on commerce cannot be regarded as negligible."

The Supreme Court then went on to state:

"* * * It is the nature of the work done and its relation to interstate transportation which afford adequate basis for the exercise of the regulatory power of Congress."

Plaintiff relies on a decision of the National Mediation Board, November 9, 1950, File No. C-2505, entitled "In the Matter of Representation of Employees of the Pan American World Airways, Inc. (1) Mechanical and Ground Service Employees, (2) Stock and Stores Employees". Here, the International Association of Machinists applied to the National Mediation Board to investigate a representative dispute under Section 2, Ninth Subparagraph of the Railway Labor Act among (1) mechanic and ground service employees and (2) stock and store service employees, all employed by Pan American World Airways, Inc. at its Guided Missile Range Division in Florida. The Mediation Board concluded, under a certification of March 1, 1950 that Transport Workers of America was the duly designated and authorized representative of airline mechanics and that, under certification issued in Case No. R-2777, the opinion doesn't cite the date, the International Association

of Machinists was the duly designated representative of the stock clerks and employees. In rendering its decision, the Board said, in part:

> "The principal effort made by IAM during the hearing and in their brief was to justify their claim that those employees should be considered separate crafts or classes from other similar employees of the carrier on what they call a 'functional basis', this phrase relating to the functions performed by Pan American at the Cocoa base as distinguished from the functions performed as a common carrier at their other bases handling their airline operations.
>
> "Under this Board's policy which has been in existence for many years and is well known, all employees of a common carrier, either rail or air, who perform similar work on that carrier constitute a single craft or class for representation purposes under the Act. It is not disputed that the employees in question are employees of Pan American World Airways, Inc. The Guided Missiles Range Division is not a separate corporation; it is only one of several divisions of Pan American. It has generally the same organizational setup and is under the general direction of the same executive officers of Pan American as the other divisions. It is part and parcel of Pan American, performing the same plant maintenance and ground service work at Cocoa, with a few exceptions, as is done at the operations bases."

And then, concluding, the Mediation Board said:

> "The controlling factor is the nature of the work performed by these employees, not the 'functional'

reasons for which the base at Cocoa was established."

We are told by plaintiff's counsel that this decision of the Mediation Board was affirmed by the District Court of the District of Columbia in 1957 in an unreported decision, Civil No. 4490-57. It apparently is reported in 32 Labor Cases 440. We have been unable to locate that decision by telephone to the library of the State Supreme Court. However, since the courts are without power to review the certification of the National Mediation Board; we are in ignorance as to just what this decision in the District Court of Columbia held.

This Court is urged by plaintiff to adopt the views of the National Mediation Board which are contrary to the decision of the Eighth Circuit in the Northwest Airlines case, and to adopt the theory that the controlling factor is the nature of the work performed by the employee and not the "functional" reasons for which Pan American engaged in the activity at the Nevada Test Site.

This Court feels that the position of the Mediation Board is contrary to the spirit and intent of the National Railway Labor Act and, therefore, rejects the same and elects to follow what we feel the better reasoned and also the weight of authority represented by Northwest Airlines. If we disregard, as plaintiff urges and as the Mediation Board held in connection with plaintiff's Cape Canaveral activities, the functional reasons and establish as the controlling factor the nature of the work, it would seem to this Court, for example, that a painter properly within the National Railway Labor Act, while employed for maintenance of aircraft at an airfield, would still be governed

by the Railway Labor Act if the carrier for some reason should purchase a shoe factory and assign the painter to the shoe factory for maintenance painting.

Considering the verified complaint in this case, the affidavits, the memoranda, and arguments of counsel, this Court would, if the law would permit, pending final determination of this case, consider it on the merits, which of course we do not reach, readily enjoin picketing in this labor dispute, which appears essentially to be a jurisdictional dispute threatening to disrupt or interrupt vital defense work in which plaintiff is assisting the Atomic Energy Commission in development of nuclear rocket missiles. However, we can and do not reach this point. I hold that this Court does not have jurisdiction to grant the injunctive relief sought and that, based on plaintiff's verified complaint, its memoranda, oral and written, its representations, representations of counsel, and the testimony of Mr. Yordy, plaintiff's project manager, the activities of plaintiff at the Nuclear Rocket Development Station in Nevada bears only a tenuous, negligible and remote relationship to Pan American's transportation activities, and that since the Railway Labor Act in its application is limited to transportation and to those functions closely related thereto, then under Subsection (e) of Section 104 of Title 29, U. S. C., the Norris-LaGuardia Act, limiting the injunctive powers of the courts of the United States, is applicable. See Sinclair v. Atkinson, a 1962 decision of the Supreme Court of the United States, 370 U. S. 195, and this Court has no power to grant plaintiff the injunctive relief sought.

Therefore, the Motion for Preliminary Injunction is denied and the Temporary Restraining Order heretofore issued is dissolved.

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Decision of National Mediation Board of July 10, 1956

NATIONAL MEDIATION BOARD
WASHINGTON

July 10, 1956
File No. C-2202

Mr. A. J. Hayes, International President
International Association of Machinists
1360 Connecticut Avenue, N. W.
Washington, D. C.

Re: Pan American World Airways, Inc.
Employees at Guided Missile Range
Base, Cocoa, Florida.

Dear Mr. Hayes:

This is in further reply to your letter of February 23, 1956, in which you requested an opportunity to present oral argument to the Board on the question of whether or not the National Mediation Board has jurisdiction over the employees at the Guided Missile Range Division of Pan American World Airways, Incorporated, at Cocoa, Florida.

As you know, the hearing requested was held on March 15, 1956, in the offices of this Board at which time your representatives and representatives of the Transport Workers Union of America and of the United Plant Guard Workers of America appeared. Subsequently, briefs from the interested parties were furnished to the Board. The record of the hearing and the views and arguments expressed in the briefs, as well as the record of the hearing held by the National Labor Relations Board in their Cases Nos. 10-RC-3208 and 10-RC-3275, have been carefully considered by this Board.

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The position taken by the International Association of Machinists in their argument and brief in opposition to the Board's previously expressed opinion that the employees of Pan American World Airways at Cocoa, Florida, are under the jurisdiction of the Railway Labor Act, as amended, is premised upon three principal contentions which we have considered, and our views with reference to them are set out hereinafter.

It is first contended by the International Association of Machinists that the Mediation Board, in expressing its opinion to the National Labor Relations Board did so without the benefit of a hearing and an opportunity by interested parties to present their views. It must be remembered that at the time our Board wrote to the National Labor Relations Board with reference to this matter on January 30, 1956, there had already been held, by an examiner of the NLRB, a hearing fully developing the facts. At this hearing representatives of the International Association of Machinists, the Transport Workers Union of America and the United Plant Guard Workers were present and evidence was taken from the Company and other interested parties as to the character of the work performed by employees in question. At that hearing there was also presented the issue of whether or not the National Labor Relations Board had proper jurisdiction over these particular employees. Briefs of the parties were presented. This entire record was made available to the National Mediation Board and was fully considered prior to our letter of January 30, 1956. Because of this opportunity for the parties to express fully their views, it was not deemed necessary for this Board to hold a duplicate hearing. The request of the International Association of Machinists for a hearing made February 23,

1956, was only for the opportunity to express argument to the Board. It was clearly stated in that letter that a duplicate hearing to ascertain the facts was unnecessary, as the record facts developed at the hearing before the National Labor Relations Board at Titusville, Florida, are adequate. This is further recognized in the statement of counsel for the Transport Workers Union and the International Association of Machinists at the hearing held on March 15, 1956, appearing at pages 41-44, inclusive, of the transcript of that proceeding.

In the light of the entire record in this case before the National Labor Relations Board and before this Board, it cannot reasonably be said the Mediation Board acted improperly, hastily, or without the opportunity for interested parties to express in full their views.

The second contention made by the International Association of Machinists is that the opinion of the Board expressed to the National Labor Relations Board was purely advisory and not made in the course of any representation proceeding where determination of the Board's jurisdiction was recognized. We do not feel our letter of January 30, 1956, to the National Labor Relations Board to be an advisory opinion as characterized in argument and in your brief. It was a specific assertion of jurisdiction, and was so regarded by the NLRB. Obviously, in situations where it might appear that the jurisdiction of different agencies of the Government overlap or are in conflict, the view of one agency expressed to the other is altogether proper. At the time this letter was written to the NLRB, the Board had before it, as explained above, a full record. Furthermore, there was pending before the Board an inquiry from the Transport Workers Union which was the

certificated organization covering employees in the mechanical craft or class on the Pan American World Airways.

On March 31, 1954, the Transport Workers Union advised the Board that a dispute existed between it and the Pan American World Airways over the claim of the TWU to represent the employees of the Pan American at the U. S. Missile Base, Cocoa, Florida. The organization requested the Board to investigate the dispute concerning the representation of these employees.

Under date of April 20, 1954, Pan American World Airways advised the Board with reference to this matter that no dispute existed which was subject to the Railway Labor Act.

On May 4, 1954, we requested the Transport Workers Union to be more specific in their request of the Board as to what it wanted the Board to investigate. We advised the organization, at that time, that the Carrier took the position that these employees were not subject to the Railway Labor Act.

Under date of June 24, 1954, the Transport Workers Union advised the Board it was their position that the employees were covered under the current agreement—Airline Mechanics and Ground Service Employees—and requested the Board to make a determination.

Under date of July 14, 1954, the Board advised Pan American World Airways and the Transport Workers Union that it would hold a public hearing on the question of jurisdiction of this Board over the employees involved. A hearing was never held on the merits for various reasons, among which was the fact that subsequent to the announcement that the Board would hold a hearing, the International Association of Machinists requested certification

under the Taft Hartley Act and made application for such to the National Labor Relations Board. The NLRB conducted a full hearing where the parties had an opportunity to present their facts and views. After this hearing was held by the NLRB, but before the NLRB had made a determination, the National Mediation Board felt it was its duty to advise the NLRB of its position. Accordingly, we advised that Agency that it was the opinion of the National Mediation Board that it has jurisdiction over these employees. This opinion was reached after review of the transcripts and briefs presented in the NLRB hearing. The NLRB thereafter dismissed the proceedings brought by the International Association of Machinists. The letter to the NLRB was not an advisory opinion, but a communication which this Board deemed its duty to send in light of the conflict existing between two groups as to which Board had jurisdiction. Having reached the conclusion that the employees at the Missile Base, insofar as their rights were concerned, are within the purposes and intent of the Railway Labor Act, it was the duty of this Board to so advise the NLRB.

The third and principal contention made by the International Association of Machinists is that the Board's opinion is contrary to law and conflicts with agency determinations and judicial decisions of long standing. It is interesting to note that no determinations of this Agency, the National Mediation Board are cited. In support of this contention, the International Association of Machinists relies principally upon the case of Jackson vs. Northwest Airlines, 185 F. 2d 74. In that case the question was whether or not the employees of the Northwest Airlines engaged in work at the modification center, which was work performed for the Air Force in modifying planes for war service, were em-

ployees within the meaning of the Fair Labor Standards Act. The Court found that the work performed at the modification center, on the bombers, was tenuous, remote and negligible with respect to the transportation activities of the airline, and found that such employees were under the Fair Labor Standards Act and not exempt from the overtime provision of that Act, which excluded employees subject to the Railway Labor Act. The court based its conclusion on the relation of the activities of the employees to transportation, and further found that the exemption provisions of the Wage and Hour Act must be construed liberally so as to effectuate the purpose of that Act to eliminate "substandard" labor conditions. The decision was primarily designed to give these employees overtime after 40 hours per week, as the 40 hour week was not then in effect for most rail and airline employees.

The Board does not feel bound by this decision for the reason that in the Jackson case, the issue involved the payment of overtime compensation, not the right of employees to organize for representation purposes. Title II of the Railway Labor Act, which relates to airlines, is written in simple unambiguous language: "All of the provisions of title I of this Act . . . are extended to and shall cover every common carrier by air engaged in interstate or foreign commerce . . . and every air pilot or other person who performs any work as an employee . . ." The test is simple: Is the employer a common carrier by air engaged in interstate commerce? Does the individual perform any work as an employee? If both answers are in the affirmative, the Board's jurisdiction is clear.

The record made before the National Labor Relations Board and reiterated in the briefs of the parties discloses that

there is no material dispute as to the facts. It is admitted, by the parties, that Pan American World Airways is a carrier within the definition of Title II of the Railway Labor Act, as amended. It is further undisputed that the employees involved herein are performing, in general, plant maintenance work of the kind and character that is performed by similar employees for the same company at its bases where its planes are maintained. This work at Cocoa primarily consists of maintaining facilities used by other companies in the work prescribed for them by the Government at this Missile Base. The employees involved include painters, carpenters, electricians, plumbers, laborers, janitors, mechanics, welders, millwrights, metal workers and others closely connected therewith in the performance of such work. The kind of work the employees perform is identical with the work performed by other employees of the same craft at the regular established bases of Pan American World Airways. The departmental organization of Pan American World Airways at the Missile Base is similar to that in effect on the other divisions of Pan American and the executive controls from headquarters are the same as on other divisions.

The International Association of Machinists' brief states (page 7) that the only issue is whether Pan American World Airways in the performance of its operations at Cocoa is a common carrier by air, etc. They then proceed to urge upon us that this activity of Pan American World Airways at missile bases is so tenuous and remote from its activity as a carrier of persons or property that such activity at the missile base is outside of the contemplated jurisdiction of the Railway Labor Act. Whether or not this may be so in contemplation of the purposes of

statutes such as the Fair Labor Standards Act or the Walsh-Healy Act, or any other similar statutes is not the primary consideration. The principal question is whether the employees at Cocoa are engaged in activity so remote from the activity of the employer, as a carrier by air, that it may reasonably be said that the purposes of the Railway Labor Act will be achieved in the event such employees are excluded from the jurisdiction of the Act.

Suppose the position of the International Association of Machinists is adopted and the employees at the Missile Base are held not to be under the Railway Labor Act; and further suppose that sometime hereafter a labor dispute arises between such employees and their employer, the Pan American World Airways, and a strike is threatened with attendant picket lines. If picket lines were then to be established, it is reasonable to suppose that the main offices and air bases would be picketed. What effect would such picketing have upon the functioning of Pan American World Airways as a common carrier of persons or property?

It is the express purpose of the Railway Labor Act to avoid any interruption to commerce or to the operation of any carrier engaged therein and to accomplish such purpose the Act provides a number of steps that may be required of the parties for the protection of the public. If these employees are deemed to be excluded from the Act, then in the face of a serious labor dispute, the National Mediation Board would not be in a position to proffer its mediatory services under Section 5 of the Railway Labor Act; and if a labor dispute persisted and threatened to substantially interrupt interstate commerce to a degree such as to deprive a section of the country of essential transportation service, then the Mediation Board could not notify the President so

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that he might create an emergency board, as provided in Section 10 of the Railway Labor Act.

In the light of the purposes of the Railway Labor Act to insure to the public, to the employees and to employers a means of settling disputes of the employees as to who may represent them for collective bargaining purposes and to settle disputes between employer and employees so as to avoid interruption to commerce, we must conclude that the relationship of employees performing the functions that are performed for Pan American at Cocoa, Florida Missile Base by its employees is not so tenuous and remote as to remove them from the jurisdiction of the Railway Labor Act.

The Board, therefore, concludes that it should not rescind its advice to the National Labor Relations Board regarding its jurisdiction over employees of Pan American World Airways at Cocoa, Florida.

By order of the NATIONAL MEDIATION BOARD.

/s/ E. S. Thompson

E. S. Thompson
Executive Secretary

cc-to: E. M. Goulard, Asst. VP, PAWA
J. F. Horst, Intl. VP, TWU
F. M. Kleiler, Exec. Secy, NLRB
E. J. Hickey, Atny. Tower Bldg., Wash., D. C.
E. S. Bunin, Atny. UPGW, 1503 Ford Bldg., Detroit 26
O'Donnell & Schwartz, Atnys. 2 W. 45th St., N. Y.

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Decision of National Mediation Board of November 9, 1956

NATIONAL MEDIATION BOARD
WASHINGTON

In the matter of REPRESENTATION OF EMPLOYEES of the PAN AMERICAN WORLD AIRWAYS, INC. (1) Mechanical and Ground Service Employees (2) Stock and Stores Employees	FILE NO. C-2505 DISMISSAL November 9, 1956

On July 16, 1956, the International Association of Machinists, AFL-CIO, hereinafter referred to as IAM filed an application with this Board to investigate a representation dispute under Section 2, Ninth of the Railway Labor Act among (1) Mechanical and Ground Service Employees and (2) Stock and Stores Employees, employed by Pan American World Airways, Inc. hereinafter referred to as the carrier, at its Guided Missiles Range Division, Cocoa, Florida. In transmitting this application, IAM stated they seek to represent these employees as separate crafts or classes because they "are employed in a separate and functionally distinct operation of the employer and have special and distinct interests apart from other employees of the company." On August 7, 1956, the IAM filed an amended application for the same group of employees, identical with the application of July 16, except for the number of employees and number of cards submitted. In view of proceed-

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ings heretofore had before this Board and the National Labor Relations Board, more specifically set forth below, the applications identified above were filed by the IAM without conceding that the National Mediation Board has jurisdiction of the carrier and the employees working at the Guided Missiles Range Division, Cocoa, Florida.

On March 1, 1950, in Case R-2225, the Board certified the Transport Workers Union of America, CIO, hereinafter referred to as TWU, as the representative of the craft or class of Airline Mechanics of the carrier. Also, on December 7, 1953, the Board in Case R-2777 certified the IAM as representative of the craft or class of stock clerks of the carrier.

TWU, when notified of this application, objected to the investigation on the ground that the plant maintenance and ground service employees are now covered by the current agreement between TWU and the carrier and urged the Board to dismiss the IAM application and "indicate to all parties concerned that the employees of the Guided Missile Range Division of Pan American World Airways, Inc. are employees of Pan American World Airways, Inc. within the meaning of the existing certification and collective bargaining agreement between the Transport Workers Union of America and Pan American World Airways, Inc."

In view of the contentions of the two organizations, the Board ordered a public hearing to be held in its Washington Office at 10:00 A. M. Tuesday, August 14, 1956, on the question of whether separate crafts or classes exist for employees of the carrier employed in the Guided Missiles Range Division.

The IAM on August 19, 1955 filed an application with the National Labor Relations Board for an election among

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certain employees of the Pan American World Airways at the Guided Missiles Range Division, Cocoa, Florida. Prior thereto, on March 31, 1954, TWU had advised the National Mediation Board that a dispute existed between it and Pan American over claim that TWU represented the carrier's employees working at the Guided Missiles Range Division, Cocoa, Florida. TWU requested this Board to investigate the dispute concerning the representation of these employees but it did not file a formal application for the Board's services under Section 2, Ninth of the Railway Labor Act.

On June 24, 1954, TWU further advised this Board that it was their position that the employees in question were covered under their current agreement for airline mechanics and ground service employees of Pan American, and requested the Board "to make a determination in this case."

The carrier said:

> "The operation which Pan American is conducting at Cocoa under contract with the United States Air Force bears so remote a relationship to our regular business as an international air transportation carrier that we are convinced, in view of the holding of the United States Circuit Court of Appeals, Eighth Circuit in the case of *Northwest Airlines* v. *Jackson*, 185 F. 2nd 74, that it is not subject to the provisions of the Railway Labor Act."

In view of that position, the carrier regarded the then current agreements with TWU made under the Railway Labor Act to be inapplicable. The dispute between TWU and the carrier was considered by the Board in Executive Session on July 12, 1954. It directed that a public hearing

be held on the question of the jurisdiction of this Board over the employees involved. No application was made by TWU for this Board's mediation services under Section 5 or Section 6 of the Act. No hearing was held on this subject at that time.

On October 19 and 20, 1955 a hearing was held by the NLRB on the petition filed with that agency by the IAM. The transcripts and briefs filed in that proceeding were examined by the members of the National Mediation Board. On January 30, 1956, the Executive Secretary of the National Mediation Board advised the NLRB as follows:

> "The transcripts and briefs which you forwarded with your letters of November 17th and 18th have been reviewed by the members of this Board. I have been directed to advise you that on the basis of information developed in the hearing conducted by your examiner at Titusville, Florida, the National Mediation Board is of the opinion that it has jurisdiction over the employees involved in this dispute under the provisions of the Railway Labor Act, as amended."

On February 23, 1956, the IAM requested permission to present oral argument to this Board limited to the question as to whether the National Mediation Board has jurisdiction over employees of the carrier at the Cocoa Base. In that request, the IAM advised that it was not their purpose to present additional evidence because it was their belief that the record facts developed before the National Labor Relations Board were adequate. Although opposed by TWU, argument on the record was held by this Board on March 15, 1956.

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On July 10, 1956, this Board rendered its opinion on the issues raised by the parties. For reasons fully set forth in that opinion, and more specifically made a part hereof, the Board concluded that it should not rescind its advice to the National Labor Relations Board regarding its jurisdiction over employees of Pan American World Airways, Inc. at Cocoa, Florida.

On July 16, 1956, the instant application followed with a request for a public hearing on the issue of a proper craft or class. The Board directed that a hearing be held on August 14, 1956. It was held at the designated time and place before Chairman Robert O. Boyd and Board Member Leverett Edwards. Appearances were made by TWU, IAM, and the carrier. Full opportunity was given the parties to present evidence, examine and cross-examine witnesses. Both organizations filed briefs after the hearing.

The occupational classifications of the employees covered by the IAM application are as follows:

> "1. All mechanical and ground service employees at the Company's Guided Missiles Range Division, Cocoa, Florida, including, but not limited to, painters, electricians, truck drivers, high pressure air men, refrigerator mechanics, plumbers, pipe fitters, heavy equipment operators, carpenters, powerhouse operators, Diesel mechanics, automotive cleaners, masons, air-conditioning operators, heating plant operators, liquefied gas mechanics, tire repairmen, water and sewage machinists, sequencer mechanics, sign painters, chauffeurs, water plant operators, janitors, laborers.

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"2. Stock and stores employees at the Company's Guided Missiles Range Division located at Cocoa, Florida."

In the Board's determination in Case R-1447, issued October 1, 1945, it was found that plant maintenance mechanics and ground service employees of airlines are a part of the craft or class of airline mechanics. The IAM does not dispute the fact that these employees at the Guided Missiles Range Division have the same skills and generally perform the same work at the Missile Base as is the case with plant maintenance mechanics and ground service employees of Pan American at its other bases handling air line operations. In fact, IAM on Page 3 of their brief makes the following statement:

> "With the exception of a few positions, the duties of which are peculiarly related to the fueling and launching of guided missiles, the work performed by these employees is basically similar to that performed by the mechanical and ground service personnel of Pan Am at its common carrier air terminals."

The principal effort made by IAM during the hearing and in their brief was to justify their claim that these employees should be considered separate crafts or classes from other similar employees of the carrier or what they call a "functional basis", this phrase relating to the functions performed by Pan American at the Cocoa base as distinguished from the functions performed as a common carrier at their other bases handling their airline operations.

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Under this Board's policy which has been in existence for many years and is well known, *all* employees of a common carrier, either rail or air, who perform similar work on that carrier constitute a single craft or class for representation purposes under the Act. It is not disputed that the employees in question are employees of Pan American World Airways, Inc. The Guided Missiles Range Division is not a separate corporation; it is only one of several divisions of Pan American. It has generally the same organizational setup and is under the general direction of the same executive officers of Pan American as the other divisions. It is part and parcel of Pan American, performing the same plant maintenance and ground service work at Cocoa, with a few exceptions, as is done at the operations bases. The controlling factor is the nature of the work performed by these employees, not the "functional" reasons for which the base at Cocoa was established.

It may be noted here that the Board has recently conducted a representation election among plant guards employed by Pan American on a system-wide basis, including the guards employed at the Cocoa base, Case R-3076, and on September 7, 1956, issued a certification to the United Plant Guard Workers of America as bargaining representative.

CONCLUSION

Based on the entire record in this case, including the record of hearing held before the NLRB examiner in their case 10-RC-3275 the National Mediation Board finds as follows:

1. The carrier and employees in this case are respectively a carrier and employees within the meaning

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Decision of National Mediation Board of November 9, 1956.

of the Railway Labor Act, as amended; that this Board has jurisdiction over the Dispute alleged herein and that the interested parties have been given due notice of investigation.

2. Under certification issued in Case R-2225, the Transport Workers of America, AFL-CIO. is the duly designated and authorized representative of the craft or class of airline mechanics employed by Pan American Airways, Inc.

3. Under certification issued in Case R-2777, the International Association of Machinists is the duly designated and authorized representative for the purposes of the Railway Labor Act of stock clerks, employees of Pan American World Airways, Inc.

4. The plant maintenance mechanics and ground service personnel of Pan American, also the stock clerks, employed at the Guided Missiles Range Division at Cocoa, Florida, are not separate crafts or classes for representation purposes under Section 2, Ninth, of the Railway Labor Act.

Based upon the findings above, the application of IAM dated July 16, 1956, as amended, August 7, 1956, is dismissed.

By direction of the NATIONAL MEDIATION BOARD.

E. C. Thompson
Executive Secretary

Appendix A

Decision of National Mediation Board of October 29, 1963

NATIONAL MEDIATION BOARD
WASHINGTON

October 29, 1963.

Re: File No. C-3367

Air Transport Division
Transport Workers Union of America, AFL-CIO
80-07 Broadway
Elmhurst 73, New York

Attention: James F. Horst
International Vice President

Gentlemen:

On July 23, 1963, the Transport Workers Union of America, AFL-CIO, invoked the services of this Board requesting that the Board assert its jurisdiction over certain operations and employees of Pan American World Airways, Inc., employed at the Nuclear Rocket Development Station (NRDS) at the Nevada Test Site, and further clarify existing certifications to establish the right of TWUA to represent said employees under the Railway Labor Act.

This case was docketed by the Board under the above-stated number and a hearing was scheduled and held at Las Vegas, Nevada, on August 20 and 21, 1963, on the preliminary question of the Board's jurisdiction under the Railway Labor Act over said Company and its employees at that site.

Appendix A

Decision of National Mediation Board of Oct[illegible]

The Building Trades Department, AFL-CIO, and the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employees, AFL-CIO, requested and received permission from the Board to intervene and participate in this hearing. The parties before the Board at the hearing held in Las Vegas, in addition to the two organizations mentioned in the preceding sentence, were: TWUA and Local 525 of that organization; Building and Construction Trades Council of Clark, Lincoln, Nye, and Esmeralda Counties, Nevada, AFL-CIO, its affiliated Local Unions; the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and Teamsters Local Union No. 631, IBT; the Hotel and Restaurant Employees and Bartenders International Union, AFL-CIO, and Culinary Workers Union, Local 226, Las Vegas, Nevada, HRE&BIU, AFL-CIO. In addition thereto, appearances were made by Pan American World Airways, Inc., and the Atomic Energy Commission. The latter two were permitted to participate to the extent of furnishing the Board with technical advice and guidance.

All the foregoing participants were given permission to file post-hearing briefs on the question of the Board's jurisdiction. With the exception of the Atomic Energy Commission, all the aforesaid did so. These briefs were originally scheduled to be received on September 21, 1963. At the request of one of the parties, this time was extended until October 1, 1963, at which time they were received.

In their respective briefs, Building and Construction Trades Council of Clark, Lincoln, Nye, and Esmeralda Counties, Nevada, AFL-CIO; its affiliated Local Unions; International Brotherhood of Teamsters, Chauffeurs,

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Decision of National Mediation Board of October 29, 1963

Warehousemen and Helpers of America and Teamsters Local Union No. 631, IBT, as well as the Building and Construction Trades Department, AFL-CIO, requested permission to argue orally before the Board before a determination on the issue of jurisdiction was made. The Board has considered this request. In view of the extensive briefs submitted, and the full record made in the hearing, the Board has decided that oral argument is not required; and hence the request is denied.

The Board has considered all the evidence and argument submitted to it in this proceeding. It has also carefully reviewed the statutory and judicial citations furnished by the parties. Based on the record before it, the National Mediation Board finds as follows:

1. The carrier and the employees involved are respectively a carrier and employees within the meaning of the Railway Labor Act.

2. The employees of Pan American World Airways, Inc., working for the Space Nuclear Propulsion Office (SNPO) project at the Las Vegas Test Site are employees of a carrier subject to the provisions of the Railway Labor Act.

3. The activities in which these employees of the carrier, who are based at the Nevada Test Site, are engaged have such a functional relationship to the over-all operations of this carrier that assertion of jurisdiction is mandated by the statute.

4. At an appropriate time and at an appropriate place, the Board shall conduct a hearing as to the applicability of existing certifications to the employees of

Appendix A

Decision of National Mediation Board of October 29, 1963

Pan American World Airways, Inc., working under the existing agreement between said carrier and SNPO at the Las Vegas Test Site, or other unit determinations which may be made on proper application under the statute.

By direction of the NATIONAL MEDIATION BOARD.

Very truly yours

E. C. Thompson

E. C. THOMPSON
Executive Secretary

cc: All parties and participants in the August 20 and 21 hearing.

APPENDIX B

Statute Involved

RAILWAY LABOR ACT, 45 U. S. C. §§ 151-188 (1958)

§ 151, 48 Stat. 1185 (1934). Definitions.

When used in this chapter and section 225 of Title 28 and for the purposes of said chapter and section—.

First. The term "carrier" includes any express company, sleeping-car company, carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service (other than trucking service) in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the business of any such "carrier" * * *

* * *

Fifth. The term "employee" as used herein includes every person in the service of a carrier (subject to its continuing authority to supervise and direct the manner of rendition of his service) who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted by orders hereafter entered by the Commission pursuant to the authority which is conferred upon it to enter orders amending or interpreting such existing orders: *Provided, however*, That no occupational classification made by order of the Interstate Commerce Comission shall be construed to define the crafts according to which railway employees may be organized by

their voluntary action, nor shall the jurisdiction or powers of such employee organizations be regarded as in any way limited or defined by the provisions of this chapter or by the orders of the Commission.

* * *

§ 151a. 48 Stat. 1186 (1934). General purposes.

The purposes of the chapter are: (1) To avoid any interruption to commerce or to the operation of any carrier engaged therein; (2) to forbid any limitation upon freedom of association among employees or any denial, as a condition of employment or otherwise, of the right of employees to join a labor organization; (3) to provide for the complete independence of carriers and of employees in the matters of self-organization to carry out the purposes of this chapter; (4) to provide for the prompt and orderly settlement of all disputes concerning rates of pay, rules, or working conditions; (5) to provide for the prompt and orderly settlement of all disputes growing out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions.

§ 152. 48 Stat. 1186 (1934). General duties.

First. **Duty of carriers and employees to settle disputes.** It shall be the duty of all carriers, their officers, agents, and employees to exert every reasonable effort to make and maintain agreements concerning rates of pay, rules, and working conditions, and to settle all disputes, whether arising out of the application of such agreements or otherwise, in order to avoid any interruption to commerce or to the operation of any carrier growing out of any dispute between the carrier and the employees thereof.

Second. **Consideration of disputes by representatives.** All disputes between a carrier or carriers and

its or their employees shall be considered, and, if possible, decided, with all expedition, in conference between representatives designated and authorized so to confer, respectively, by the carrier or carriers and by the employees thereof interested in the dispute.

* * *

Seventh. **Change in pay, rules, or working conditions contrary to agreement or to section 156 forbidden.** No carrier, its officers, or agents shall change the rates of pay, rules, or working conditions of its employees, as a class, as embodied in agreements except in the manner prescribed in such agreements or in section 156 of this title.

* * *

Ninth. **Disputes as to identity of representatives; designation by Mediation Board; secret elections.** If any dispute shall arise among a carrier's employees as to who are the representatives of such employees designated and authorized in accordance with the requirements of this chapter, it shall be the duty of the Mediation Board, upon request of either party to the dispute, to investigate such dispute and to certify to both parties, in writing, within thirty days after the receipt of the invocation of its services, the name or names of the individuals or organizations that have been designated and authorized to represent the employees involved in the dispute, and certify the same to the carrier. Upon receipt of such certification the carrier shall treat with the representative so certified as the representative of the craft or class for the purposes of this chapter. In such an investigation, the Mediation Board shall be authorized to take a secret ballot of the employees involved, or to utilize any other appropriate method of ascertaining the names of their duly designated and authorized representatives in such manner as shall insure the choice of repre-

sentatives by the employees without interference, influence, or coercion exercised by the carrier. In the conduct of any election for the purposes herein indicated the Board shall designate who may participate in the election and establish the rules to govern the election, or may appoint a committee of three neutral persons who after hearing shall within ten days designate the employees who may participate in the election. The Board shall have access to and have power to make copies of the books and records of the carriers to obtain and utilize such information as may be deemed necessary by it to carry out the purposes and provisions of this paragraph.

* * *

§ 155. 48 Stat. 1195 (1934). Functions of Mediation Board.

First. **Disputes within jurisdiction of Mediation Board.** The parties, or either party, to a dispute between an employee or group of employees and a carrier may invoke the services of the Mediation Board in any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to the National Railroad Adjustment Board and not adjusted in conference between the parties or where conferences are refused.

The Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

In either event the said Board shall promptly put itself in communication with the parties to such controversy, and shall use its best efforts, by mediation, to bring them to agreement. If such efforts to bring about an amicable settlement through mediation shall be unsuccessful, the said

Board shall at once endeavor as its final required action (except as provided in paragraph third of this section and in section 160 of this title) to induce the parties to submit their controversy to arbitration, in accordance with the provisions of this chapter.

If arbitration at the request of the Board shall be refused by one or both parties, the Board shall at once notify both parties in writing that its mediatory efforts have failed and for thirty days thereafter, unless in the intervening period the parties agree to arbitration, or an emergency board shall be created under section 160 of this title, no change shall be made in the rates of pay, rules, or working conditions or established practices in effect prior to the time the dispute arose.

* * *

§ 156. 48 Stat. 1197 (1934). Procedure in changing rates of pay, rules, and working conditions.

Carriers and representatives of the employees shall give at least thirty days' written notice of an intended change in agreements affecting rates of pay, rules, or working conditions, and the time and place for the beginning of conference between the representatives of the parties interested in such intended changes shall be agreed upon within ten days after the receipt of said notice, and said time shall be within the thirty days provided in the notice. In every case where such notice of intended change has been given, or conferences are being held with reference thereto, or the services of the Mediation Board have been requested by either party, or said Board has proffered its services, rates of pay, rules, or working conditions shall not be altered by the carrier until the controversy has been finally acted upon, as required by section 155 of this title, by the Mediation Board, unless a period of ten days has elapsed after termina-

tion of conferences without request for or proffer of the services of the Mediation Board.

* * *

§ 160. 44 Stat. 586 (1926). 48 Stat. 1197 (1934). Emergency Board.

If a dispute between a carrier and its employees be not adjusted under the foregoing provisions of this chapter and should, in the judgment of the Mediation Board, threaten substantially to interrupt interstate commerce to a degree such as to deprive any section of the country of essential transportation service, the Mediation Board shall notify the President, who may thereupon, in his discretion, create a board to investigate and report respecting such dispute. Such board shall be composed of such number of persons as to the President may seem desirable: *Provided, however*, That no member appointed shall be pecuniarily or otherwise interested in any organization of employees or any carrier. The compensation of the members of any such board shall be fixed by the President. Such board shall be created separately in each instance and it shall investigate promptly the facts as to the dispute and make a report thereon to the President within thirty days from the date of its creation.

* * *

After the creation of such board and for thirty days after such board has made its report to the President, no change, except by agreement, shall be made by the parties to the controversy in the conditions out of which the dispute arose.

§ 181. 49 Stat. 1189 (1936). Application of sections 151, 152, and 154-163 to carriers by air.

All of the provisions of sections 151, 152, and 154-163 of this title are extended to and shall cover every common

carrier by air engaged in interstate or foreign commerce, and every carrier by air transporting mail for or under contract with the United States Government, and every air pilot or other person who performs any work as an employee or subordinate official of such carrier or carriers, subject to its or their continuing authority to supervise and direct the manner of rendition of his service.

§ 182, 49 Stat. 1189 (1936). Same; duties, penalties, benefits, and privileges.

The duties, requirements, penalties, benefits, and privileges prescribed and established by the provisions of sections 151, 152 and 154-163 of this title shall apply to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of "carrier" and "employee", respectively, in section 151 of this title.

§ 183, 49 Stat. 1189 (1936). Disputes wtihin jurisdiction of Mediation Board.

The parties or either party to a dispute between an employee or a group of employees and a carrier or carriers by air may invoke the services of the National Mediation Board and the jurisdiction of said Mediation Board is extended to any of the following cases:

(a) A dispute concerning changes in rates of pay, rules, or working conditions not adjusted by the parties in conference.

(b) Any other dispute not referable to an adjustment board, as hereinafter provided, and not adjusted in conference between the parties, or where conferences are refused.

Appendix B
Statute Involved

The National Mediation Board may proffer its services in case any labor emergency is found by it to exist at any time.

The services of the Mediation Board may be invoked in a case under sections 181-188 of this title in the same manner and to the same extent as are the disputes covered by section 155 of this title.

§ 184, 49 Stat. 1189 (1936). System, group, or regional boards of adjustment.

The disputes between an employee or group of employees and a carrier or carriers by air growing out of grievances, or out of the interpretation or application of agreements concerning rates of pay, rules, or working conditions, including cases pending and unadjusted on April 10, 1936 before the National Labor Relations Board, shall be handled in the usual manner up to and including the chief operating officer of the carrier designated to handle such disputes; but, failing to reach an adjustment in this manner, the disputes may be referred by petition of the parties or by either party to an appropriate adjustment board, as hereinafter provided, with a full statement of the facts and supporting data bearing upon the disputes.

It shall be the duty of every carrier and of its employees, acting through their representatives, selected in accordance with the provisions of sections 181-188 of this title, to establish a board of adjustment of jurisdiction not exceeding the jurisdiction which may be lawfully exercised by system, group, or regional boards of adjustment, under the authority of section 153 of this title.

* * *

APPENDIX C

Affidavit of Donald W. Hunt, Sworn to August 12, 1963

(R. 218-237)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

PAN AMERICAN WORLD AIRWAYS, INC., *Appellant,* vs. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS, LOCAL UNION 1780, et al., *Appellees.*	No. 18822

AFFIDAVIT OF DONALD W. HUNT IN SUPPORT OF MOTION FOR INJUNCTION PENDING APPEAL

STATE OF FLORIDA, County of Brevard } ss.:

DONALD W. HUNT, having been first duly sworn, deposes and says:

1. I have been in the employ of PAN AMERICAN WORLD AIRWAYS, INC. ("Pan Am") more than twenty years, having started in 1942 in the maintenance operations department, in what was then the Pacific-Alaska Division at San Francisco, California. In 1944, I was assigned by Pan Am as engineering officer in connection with Pan Am's operations in various islands in the Pacific. In 1948, I became a member of the staff of the Industrial Relations Department of the Pacific-Alaska Division and continued in that department, becoming assistant to the manager. In 1960, I was transferred to become Industrial Relations Manager of Pan Am's Guided Missiles Range Division, at Cape Canaveral,

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Affidavit of Donald W. Hunt, Sworn to August 12, 1963

Florida. It is that position which I currently hold; my duties include the supervision of labor relations at the Nuclear Rocket Development Station ("NRDS") near Las Vegas, Nevada, as well as of those at Cape Canaveral.

2. I make this affidavit, in support of Pan Am's motion for an injunction pending the hearing and determination of the appeal herein, to put before the Court additional evidence that Pan Am's operations at NRDS are an integral part of its entire operation and that its functions at NRDS are the same as those at Cape Canaveral, which have been determined by the National Mediation Board to be subject to the Railway Labor Act. Appended hereto and made a part hereof as Exhibit A, is the letter ruling of the National Mediation Board dated July 10, 1956, reference to which is made in the determination of the National Mediation Board of November 9, 1956 dismissing the request of the International Association of Machinists to represent mechanics and ground service employees at Cape Canaveral and certifying the Transport Workers Union as the representative of those employees in accordance with its Pan Am system-wide designation and contract. (Exhibit 2 to affidavit of Murray Gartner, dated August 8, 1963 and filed herein).

3. Like me, Richard L. Yordy, the Project Manager for Pan Am at NRDS is a long-time employee of Pan Am, having been first employed by its Latin American Division at Miami, Florida, in 1946. He was in the Communications Department of that division for seven years, having particular responsibility for radio and teletype facilities. In 1953, he was transferred to Cape Canaveral as Manager and in 1958, he became the Division Manager of Pan Am's

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Guided Missiles Range Division which includes Cape Canaveral, NRDS, and other similar facilities.

4. Kenneth Murphy, who is the Superintendent of Production Control at NRDS, was first employed by Pan Am in 1941 as a mechanic in its Pacific-Alaska Division at San Francisco, California. He then became Warranty Claims Supervisor in San Francisco, and later was transferred to New York as assistant to the Engine Overhaul Shop superintendent. Still later, he was made Supervisor of Production Control at Cape Canaveral, Florida, and then promoted to his present position at NRDS.

5. In addition to the fact that the supervisory personnel at NRDS, as stated above, have a long history of employment in the various divisions of Pan Am, most recently at the Cape Canaveral facility of the Guided Missiles Range Division, the employees hired in the class or craft of airline mechanics and ground service employees have been hired to fill numerous jobs the descriptions of which are precisely the same as those applicable to and used at Pan Am's operation at Cape Canaveral. In other words, the job descriptions, for example, for "mechanic, electrical plant facilities" or "mechanic, painter, industrial", and all other job descriptions of some 50 to 75 jobs are precisely the same at NRDS as they are at Cape Canaveral. In fact, five mechanics, in several different classifications, have been transferred from Cape Canaveral to NRDS, and are now working there.

6. All new employees at NRDS have been given Pan Am's "Employees' Handbook" describing the operations of the company and its divisions with particular reference to the Guided Missiles Range Division and notifying the

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employees of the rights and benefits which they have in common with all other Pan Am employees, including holidays, vacations, insurance, travel discount, sick leave and retirement income plan.

7. In short, many of the supervisory personnel at NRDS have been assigned to that location from Cape Canaveral, many of them having previously worked in other divisions of the company. All of the hourly-rated employees at NRDS have been hired to perform precisely the same jobs as their counterparts at Cape Canaveral are performing, under the same job descriptions. All of them are employees of Pan Am in exactly the same sense and with exactly the same terms and conditions of employment as employees of other divisions of the company, including divisions engaged in air transportation, such as the Pacific-Alaska Division (now merged into the Overseas Division) and the Latin American Division.

/s/ DONALD W. HUNT
Donald W. Hunt

Subscribed and sworn to before me
this 12th day of August 1963.

/s/ MARY M. BREADY
Mary M. Bready,
Notary Public

Notary Public State of Florida at Large
My Commission Expires Aug. 17, 1966
Bonded Through Fred W. Diestelhorst

(SEAL)

Exhibit A of this affidavit is reproduced in Appendix A, *supra*, at pages 23a-31a.

Appendix C

Affidavit of Richard L. Yordy, Sworn to August 6, 1963

NRDS, insofar as they are or will be represented by unions, under Pan Am's contract with the Transport Workers Union ("TWU"), are in the class or craft of Mechanics and Ground Service Employees, and are covered by that contract. Pan Am has no dispute with TWU.

6. Despite the fact that the picket lines established by the Building Trades and other unions did not represent any dispute between Pan Am and its employees, the purpose and effect of the picketing was to prevent deliveries of supplies essential both for the maintenance of the Station and for the performance of tests. It seems clear that if such picketing is allowed to resume, it will result in similar and additional disruption of the functioning of NRDS, as follows:

a. *Delivery of Materials from Mercury Camp Site.* Other contractors' employees, members of the picketing unions, would again, as they did during the picketing of July 30 and 31, 1963, refuse to load Pan Am's trucks at the Mercury, Nevada, support area (adjacent to NRDS) with supplies and materials for NRDS. Among the materials and supplies necessary to support the operations at NRDS, which normally come from the Mercury Camp Site, delivery of which would be prevented, are:

(1) Mechanical parts needed for operational changes to systems, to meet engineering specifications for particular tests; the lack of these parts would prevent the carrying out of tests;

(2) Air conditioning repair parts for preventative maintenance of air conditioning units; the lack of these parts would result in deterioration of delicate electronic equipment which must be maintained in a temperature-controlled environment;

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Affidavit of Richard L. Yordy, Sworn to August 6, 1963

(3) Diesel fuel; the lack of fuel delivery would require the cancellation of all tests, almost immediately, since NRDS has storage facilities for only enough diesel fuel to support one test. When the stored quantity has been used, all further test activity would have to be discontinued;

(4) High pressure gases and liquid hydrogen; these items cannot be stored except for immediate use in scheduled tests, so that the disruption of delivery would prevent any additional tests;

(5) Operational supplies, such as chemicals used to treat water; lack of these supplies would quickly begin to affect the health and safety of NRDS personnel;

(6) Gasoline for transportation within NRDS; current gasoline storage facilities are limited to a one-week capacity.

b. *Other Delivery Failures Affecting Safety.* If picketing is resumed, other deliveries will be prevented, with an incalculably harmful effect on the safety of the personnel and installations at NRDS:

(1) Protective clothing used by technicians to monitor radiation could not be processed for laundering;

(2) Unavailability of spare parts for cafeteria refrigeration systems would endanger the food supply stored there;

(3) Unavailability of spare parts for maintaining the piping for the water and fire systems would prevent proper maintenance of those systems, resulting in increased danger of fire damage for all NRDS installations;

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(4) Unavailability of necessary electrical parts would seriously hamper preventative maintenance of systems for power distribution.

7. To sum up, resumption of picketing by the defendant unions would immediately interfere with and prevent the performance by Pan Am of its support functions at NRDS, and curtail and very shortly completely stop all operations at NRDS, thus irreparably delaying the nuclear rocket program of the United States and endangering the entire installation at NRDS. By preventing Pan Am's performance of its contract with the AEC, such picketing will greatly and irreparably damage the reputation of Pan Am as a responsible contractor and injure it incalculably in its business.

8. Since I was formerly Division Manager of Pan Am's Guided Missiles Range Division at Cape Canaveral, I know that the support services performed there by Pan Am under contract with the United States Government were in all substantial respects similar to those required to be performed under Pan Am's contract covering NRDS. I also know that all Pan Am's operations at Cape Canaveral, in accordance with the decision of the National Mediation Board, in 1956, are subject to the Railway Labor Act and Pan Am's Mechanics and Ground Service employees at Cape Canaveral were, and are covered by Pan Am's collective bargaining agreement with the Transport Workers Union, for at least the past seven years. Under the Railway Labor Act, the said current agreement with the TWU is required to be, and is, Pan Am system-wide in its coverage and applies to all employees in the relevant class or craft wherever employed by Pan Am. I respectfully submit, therefore, that

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this Court should not permit unions having no relationship with Pan Am, and no claim to represent its employees, to picket with the purpose and effect of preventing Pan Am from carrying out its contractual obligations to the United States Government and its statutory obligations under the Railway Labor Act.

/s/ RICHARD L. YORDY
Richard L. Yordy

Sworn to before me this
6th day of August, 1963

/s/ MARY E. LEAVITT
Notary Public for the
State of Nevada
County of Clark

My commission expires on Nov. 8, 1965

Appendix C

Affidavit of Richard L. Yordy, Sworn to December 2, 1963

(R. 387-391)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[SAME TITLE]

STATE OF NEVADA }
COUNTY OF CLARK } ss.:

RICHARD L. YORDY, having been first duly sworn, deposes and says:

1. I am, and have been since June 7, 1963, the Project Manager for Pan American World Airways, Inc. ("Pan Am"), which renders support services at the Nuclear Rocket Development Station ("NRDS") in Nevada pursuant to a contract with the United States Atomic Energy Commission ("AEC"). It is my responsibility to supervise the discharge of Pan Am's obligations under that contract. For the prior five years, I was Pan Am's Division Manager for its Guided Missiles Range Division ("GMRD") at Patrick Air Force Base, Cape Kennedy (formerly Cape Canaveral), Florida. From 1953 to 1957 I was Base Manager at Cape Canaveral. For the seven years prior thereto, I held a variety of supervisory and administrative operations positions on Pan Am's airline system. Accordingly, I am completely familiar with the nature of Pan Am's operations at NRDS, at Cape Canaveral and on its airline system and I have personal knowledge of the facts hereinafter set forth.

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Affidavit of Richard L. Yordy, Sworn to December 2, 1963

2. I make this affidavit in support of Pan Am's application for a stay pending its petition to the Supreme Court of the United States for a writ of certiorari. This affidavit is submitted to demonstrate the identity of Pan Am's activities and of the services of its employees at NRDS, Cape Kennedy and on its airline system, as well as the close interrelationship and unity of labor relations concerning NRDS, Cape Kennedy and the airline system.

3. *Identity of Services Performed By Pan Am's Employees, And of Pan Am's Activities, At NRDS, Canaveral and On the Airline System.*

(a) The services rendered by Pan Am's employees at NRDS are, in almost every instance, identical to the services rendered by Pan Am's employees at Cape Kennedy (Canaveral) and on its airline system. Thus, for example, Pan Am's employees at NRDS, Canaveral and on the airline system render or may be required to render the following services, among others: operation and maintenance of high-pressure gas and liquid systems; measurement, monitoring and control of radiation; installation and maintenance of electronic instrumentation systems; operation and maintenance of utilities; routine and preventive maintenance of facilities; operation of computer systems, laboratories and shops; procurement, warehousing, and distribution of materials and supplies; engineering design and planning; preparation of operating and maintenance manuals and formulation of procedures; custodial; clerical; and ground transportation. A particular service, where ever it may be performed, requires identical skills, training and execution of the employees who render it and is performed by employees in the same job classification.

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(b) Accordingly, Pan Am's activities at NRDS are in most respects the same as or substantially similar to activities customarily and normally engaged in by it at Canaveral and on the airline system. The services recited in (a) above, identically performed by Pan Am employees at NRDS, Canaveral and on the airline, necessarily are an integral part of those Pan Am activities at NRDS, Canaveral and on the airline, which are the same. Thus, for example, performance by Pan Am employees of identical services of installation and maintenance of electronic equipment at NRDS, Canaveral and on the airline is necessary only because Pan Am is concerned with the same activity of installing and maintaining electronic equipment at NRDS, Canaveral and on the airline.

(c) Furthermore, the fact that Pan Am has engaged in similar activities elsewhere than at NRDS was a major reason why Pan Am was selected as the support services contractor at NRDS. A good illustration of this fact is contained in the Affidavit of Bob P. Helgeson (Chief of the Space Nuclear Propulsion Office—Nevada Extension), sworn to the first day of December, 1963, and submitted in support of Pan Am's present application. At page 5 of his affidavit, Mr. Helgeson states that one of the reasons why Pan Am was selected to render support services at NRDS was that "it had acquired substantial technical experience in the handling and uses of liquid hydrogen and high pressure gases and the techniques of radiation control" at Canaveral. In fact, long before Pan Am began rendering support services at Canaveral, its employees on its airline system engaged, as they do today, in the use, handling and maintenance of high pressure gas and liquid systems and,

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commencing primarily with the advent of jet aircraft, its airline employees have been continuously engaged in various aspects of radiation monitoring and control.

4. *Inter-Relationship of Labor Relations Matters.* Many labor relations matters involving Pan Am's employees at NRDS have substantial impact upon labor relations concerning Pan Am's employees at Cape Kennedy (Canaveral) and its employees on its airline system. Conversely, labor relations matters concerning Pan Am's employees elsewhere than at NRDS will frequently affect its NRDS employees. In view of the similarity of work performed by Pan Am, and the identity of services rendered by its employees, throughout Pan Am's operations, common questions of labor policy, administration and interpretation continuously arise. Furthermore, wage rate, fringe benefit and other compensation matters present common problems since, in most cases, the employees involved (where ever they may be located) perform services identical, or substantially identical, to those performed by Pan Am employees at other locations. And, Pan Am employees have transferred from jobs on the airline to jobs at Canaveral and NRDS. These unity of interests and community of common questions among Pan Am's employees are paramount considerations in the formulation of overall Pan Am labor policy which is generally administered and coordinated at Pan Am's system headquarters in New York City. Moreover, the close relationship between Pan Am's employees at NRDS, Canaveral and on the airline system very obviously provides the basis upon which disputes arising in one area, and possible consequent union activity there, may spread to the others, because of a community of interest

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among the various employees and because all the employees are employed by a single employer—Pan Am.

/s/ RICHARD L. YORDY
Richard L. Yordy

(SEAL)

Sworn to before me this
2nd day of December, 1963

/s/ IRENE A. KUEPPER
Notary Public
State of Nevada
County of Clark

My commission expires: April 26, 1967

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Affidavit of Bob P. Helgeson, Sworn to December 1, 1963

(R. 369-382)

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

[SAME TITLE]

STATE OF NEVADA }
COUNTY OF CLARK } ss.

BOB P. HELGESON, having been first duly sworn, deposes and says:

1. I am now, and have been since August 1, 1962, Chief of the Nevada Extension of the Space Nuclear Propulsion Office ("SNPO-N"), an office created jointly in 1962 by the United States Atomic Energy Commission ("AEC") and the National Aeronautics and Space Administration ("NASA") to administer the Nuclear Rocket Development Station ("NRDS"), formerly known as Area 400 of the Nevada Test Site. NRDS is the exclusive site for system tests in the Nuclear Rocket Development Program ("ROVER"). I have, moreover, for the last seven years, been directly concerned with ROVER in various capacities from Industrial Staff Member with the Los Alamos Scientific Laboratory to engineering management positions in industry with various companies concerned with the ROVER project. Consequently, I am thoroughly conversant with the operations at NRDS and with the reactor, engine, vehicle, and facilities aspects of the entire ROVER program, and I am personally familiar with the facts hereinafter set forth.

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2. I make this affidavit in support of the application herein by appellant Pan American World Airways, Inc. ("Pan American" which is the support services contractor for NRDS) for a stay pending its petition to the Supreme Court of the United States for a writ of certiorari. Because of the extreme importance of that application, to the United States space program, I set forth in some detail the nature of the activities that will be affected by a resumption of picketing (which seems imminent) and the effect that such picketing will have on those activities.

3. *The Nature of the ROVER Program.* The ROVER program, broadly stated, is a joint program of the AEC and NASA and is concerned with the research and development of nuclear powered engines and vehicle stages propelled by those engines for space travel with capabilities substantially in excess of the performances now obtained from chemically propelled rockets. ROVER is a significant part of the over-all United States advanced space program; the total nation-wide cost of the ROVER Program for the Fiscal Year 1963 was approximately $173,000,000; there are some $60,000,000 worth of ROVER facilities now at NRDS (with construction of an additional $100,000,000 worth of facilities anticipated for the future); and the base operating budget for NRDS for the Fiscal Year 1963 was about $6,000,000 exclusive of payrolls of some prime contractors and many items of special test equipment. The President's Budget for Fiscal Year 1964 (currently before Congress) contains a substantial increase for ROVER over Fiscal Year 1963.

4. *The Nature and Function of NRDS.* NRDS is a primary research and development test facility of the ROVER program and encompasses some 90,000 acres. The

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test control point at NRDS is situated about 26 miles from Camp Mercury, Nevada, and about 90 miles from Las Vegas, Nevada. There are currently employed at NRDS some 1200 employees. Located at NRDS are two currently active test cells for the development of nuclear reactors. Facilities are now being designed and built to test nuclear engines incorporating those reactors. Various ROVER participants, such as SNPO, the Los Alamos Scientific Laboratory, Marshall Space Flight Center, Aerojet General Corporation, Westinghouse Electric Corporation, and Lockheed Missiles and Space Company, now utilize or will utilize the facilities at NRDS in connection with their participation in the program. At the present time, research and development are concentrated upon nuclear reactors for use in nuclear rocket engines and further development of rocket engines and vehicle stages must await resolution of certain reactor problems now being investigated.

An essential supply base for NRDS is Camp Mercury, Nevada, 26 miles away, which is situated between NRDS and the only highway (U. S. 95) which services the area. At Camp Mercury, which primarily services the weapons test program of the AEC at the Nevada Test Site, are warehoused essential and ancillary supply materials, including petroleum fuels, for use at NRDS. NRDS depends on deliveries from Camp Mercury and from other points. Receipt of supplies depends on access from U. S. Highway 95. If, through picketing or other means, supplies are prevented from being delivered to NRDS as needed, operations at NRDS must inevitably cease or be seriously curtailed.

5. *Pan American's Functions at NRDS.*

(a) In order to make continuously available the capabilities of NRDS to participants of the ROVER program,

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it is necessary that operations and maintenance activities be supported by a support services contractor. Accordingly, in response to solicitations by SNPO in 1962, 28 companies submitted proposals for a contract to perform support services at NRDS. After extensive consideration, Pan American was awarded the contract based on its demonstrated competence to render the services required, including the fact that it had acquired substantial technical experience in the handling and uses of liquid hydrogen and high pressure gases and the techniques of radiation control while rendering support services for the United States Air Force at Cape Canaveral (now Cape Kennedy). On June 28, 1963, the AEC entered into a prime definitive contract with Pan American (administered by SNPO-N) to render support services at NRDS.

(b) In general, Pan American is engaged extensively in the highly technical liquid hydrogen, high-pressure gases, radiation and electronics aspects of the NRDS operation. In this connection, Pan American employees participate in or will participate in the following: maintenance and operation of vacuum-jacketed piping and storage vessels containing liquid hydrogen at approximately minus 428° F; handling and transportation of radioactive fuel elements; measuring, monitoring, and controlling radiation; installation and maintenance of electronic systems for instrumentation; collection of data gathered by those systems; and calibration of instrumentation. Additionally, Pan American is responsible for procurement of station supplies and equipment in support of NRDS operations and is also contractually responsible, among other things, for: operation of station utilities, except telephone service; general routine and preventive maintenance of all NRDS facilities, and

operational modifications; and operation of computers, laboratories and shops. Pan American does no construction work within the coverage of the Davis-Bacon Act. In addition, Pan American provides custodial janitorial services, and clerical and chauffeuring personnel to other participants of the ROVER program at NRDS. Pan American currently employs at NRDS about 460 employees, the majority of whom perform technical functions. Approximately 210 of Pan American's employees at NRDS, who are mechanical and related employees, are represented by the Transport Workers Union of America ("TWU") and are covered by a collective bargaining contract entered into between TWU and Pan American effective October 5, 1962. The remaining employees perform administrative, engineering, clerical, and supply functions.

6. *Other Significant Service Contractors at NRDS.*

(a) Catalytic Construction Company ("Catalytic") is the construction management contractor for NRDS. It accomplishes construction of facilities at NRDS (within the coverage of the Davis-Bacon Act) either through fixed-cost sub-contractors or by use of its own employees; it also inspects constructed facilities and performs engineering studies. Catalytic's sub-contractors currently employ about 250 construction workers at NRDS in addition to some 50 Catalytic construction employees there. These construction workers are members of and are provided by the building and construction trades unions and the teamsters union who are appellees herein.

(b) Reynolds Electrical and Engineering Company, Inc. ("Reynolds") employs roughly 50 people who prepare and serve food, render health and medical services, and perform

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fire protection and road maintenance functions, at NRDS. In addition, Reynolds employs at Camp Mercury an additional 800 people, some of whom perform the following services there which are necessary for NRDS operations: warehousing and issuance of stores and supplies; automotive maintenance; radiation film badge processing; operation of central telephone communications; maintenance of power transmission lines outside of NRDS; and operation of a printing office. The road and power line maintenance employees and the fire protection and medical services workers are covered by collective bargaining contracts between Reynolds and several of the appellee unions. The employees who prepare and serve food at NRDS are represented by the appellee Culinary Workers' Union and are covered by a collective agreement between that union and Reynolds.

7. The Picketing of July 30 and its Effects.

(a) Beginning early in the morning on July 30, 1963, picketing sanctioned by the appellee unions occurred at the entrance to the road leading from the main highway to Camp Mercury and NRDS. The picket signs were directed at "Area 400" (NRDS) and purported to protest "AEC and Pan Am Paying Substandard Wages." The picketing, which was recognized by the District Court to be part of what "appears essentially to be a jurisdictional dispute", continued until enjoined by a temporary restraining order issued, during the morning of July 31, 1963, by the United States District Court for the District of Nevada.

(b) The effects of that short-lived picketing were profound. A test which was scheduled to be conducted on August 2, 1963, at NRDS was necessarily postponed for

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two weeks because the company supplying the liquid hydrogen from Southern California would not dispatch its trucks because it anticipated that its union drivers would not cross the picket line. The short-duration picketing had other severe consequences. In my capacity as Chief of SNPO-N, I have been informed and advised that, in addition to a number of Pan American's NRDS employees who refused to work because of the picketing:

(1) On July 30 and at least during the morning of July 31st, all of the some 57 construction trades employees (represented by building and construction trades unions which are appellees herein) then employed by Catalytic at NRDS refused to work because of the picket line. Similarly, for that same period, 130 of about 135 construction trades employees (similarly represented) of Catalytic's sub-contractors then employed at NRDS refused to work. Consequently, construction of essential facilities at NRDS ceased.

(2) For the same period, all of the approximately 22 employees then employed by Reynolds at NRDS to prepare and service food and render ancillary services at the cafeteria there (they are represented by appellee Culinary Workers Union) refused to work.

(3) For the same period, some 25 of 28 operating engineers then employed at NRDS by Air Products and Chemical, Inc. (the contractor primarily responsible for operation of the liquid hydrogen systems prior to final assumption of that responsibility by Pan American in accordance with its contract with the AEC) refused to work. Those employees were represented by the Operating Engineers Union, an appellee herein. Hence,

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progress on the liquid hydrogen systems and preparation of those systems for contemplated tests were halted.

(4) Warehousemen at Camp Mercury, employed by Reynolds and represented by appellee Teamsters Union, refused to load needed supplies for NRDS on a truck driven from NRDS for that purpose during the morning of July 30th by Pan American employees (represented by the TWU) and the truck at that time returned to NRDS without the supplies.

8. *The Imminence of Further Picketing.* I am further informed and advised that, on November 26, 1963, in the evening, appellee Building & Construction Trades Council conducted an "Important Meeting!" at Las Vegas, Nevada, to which it had invited by printed circulars "All Employees of Pan American at NRDS Excluding Office Employees." (A true copy of that circular is annexed hereto and made a part hereof as Exhibit A.) About 75 of Pan American's 330 non-office NRDS personnel attended. The meeting was addressed by the President of the Building & Construction Trades Council, by representatives of some of its constituent unions, and by a representative of the Teamsters Union. At the meeting, I am further informed, Pan American's employees who attended were asked to fill out and sign cards authorizing "the Building and Construction Trades Council, to represent me in collective bargaining with my employer." I am further advised that, at the meeting, those in attendance were told by union representatives that, commencing on "December 4, 1963" after the outstanding injunction would expire, the unions will assert jurisdiction over Pan American's employees at NRDS and that the "full force" of all the unions would be used to obtain recognition

along craft lines of the individual unions as the collective bargaining representatives of Pan American's employees at NRDS. I am informed and understand that the injunction now in effect will expire if the Court issues its mandate herein to the District Court. In view of the experience of the picketing of July 30 and 31, and in light of the avowed intention of the appellee unions to seek recognition as described above, it seems apparent that picketing will be resumed if the restraint upon such activity is allowed to dissolve.

9. *The Effects of Further Picketing.* Resumption of picketing will, in my opinion, have extremely severe consequences. The following effects are anticipated.

(a) Many important, interrelated and interdependent system, component and facility checking tests have been scheduled to take place within the near future. These tests cannot commence or proceed without support services. With specific reference to the reactor and engine development programs, every day lost results in at least a one day slip in schedule. And, in some circumstances, a day lost can result in a loss of a week or more in scheduling.

(b) Certain significant operational modifications to the test cells are in progress. The scheduled tests depend upon completion of these operational modifications. In the event of picketing, interruption of this critical work is likely to occur.

(c) Presently under construction at NRDS are facilities required for development testing of nuclear rocket engines and various support facilities for NRDS. The construction of the engine facilities is closely scheduled on an

over-all program basis so that when the engines to be tested are ready for testing, the test facilities will be immediately available. In the event that construction workers honor picket lines, as they have in the past, construction will immediately cease, as it has in the past. It is predicted that the schedule will slip at least one day for every day that the jobs are not manned. In addition, new construction is in progress at the test cells referred to above (at which operational modifications are in progress) and is required to sustain reactor development as presently scheduled. Schedule losses ranging from one day to over a week can be anticipated to follow upon every day of such construction lost because of picketing activity.

(d) Non-receipt of essential supplies (including liquid hydrogen, high pressure helium and nitrogen, construction materials, fuel and food) will have an immediate and profound impact on NRDS operations. It is anticipated that delivery of essential supplies will be severely inhibited by the imminent picketing activity.

(e) Other and increased costs would inevitably be incurred simply because of the cost attendant upon standby time in the prospect of resuming operations. Resources generally would be wasted. Perhaps the most important of these resources is the time lost by the scientific and engineering personnel who have gathered at NRDS on behalf of the various ROVER participating contractors.

10. *Irreparable Harm.* It is my opinion as Chief of SNPO-N that resumption of picketing of NRDS will result in substantial irreparable injury to the ROVER program. The coordinated sequence of steps in the ROVER project will be interrupted; the resultant delay in the schedule can-

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not be recovered, with consequent adverse effects on the advanced activities of the United States space program.

/s/ BOB P. HELGESON
Bob P. Helgeson

Sworn to before me this
1st day of December, 1963.

/s/ RAYMOND COHEN
Notary Public
State of Nevada
County of Clark

My commission expires: February 20, 1967

Appendix C

Exhibit A to Affidavit of Bob P. Helgeson

ATTENTION! ATTENTION!

All Employees of Pan American

AT N.R.D.S.

Excluding Office Employees

Important Meeting!

Plumbers & Pipe Fitters Union Hall

PLACE: 714 South First Street — Las Vegas, Nevada
TIME: 8:00 P.M. TUESDAY, NOVEMBER 26th, 1963
PURPOSE: Economic Improvements for Employees at N.R.D.S.

This meeting is being sponsored by the Building Construction Trades Council of Clark, Lincoln, Nye and Esmeralda Counties of Nevada

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,

Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF OF TRANSPORT WORKERS UNION OF AMERICA, AFL-CIO AS *AMICUS CURIAE*

To the Honorable Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

STATEMENT

Transport Workers Union of America, AFL-CIO ("TWU"), with the written consents of all of the parties, separately filed with the Clerk of the Court, submits this

brief as *amicus curiae* in support of the petition for a writ of certiorari filed by Pan American World Airways, Inc. ("Pan Am") to review the judgment of the United States Court of Appeals for the Ninth Circuit entered on November 5, 1963 (No. 18,822).

The judgment below affirmed an order of the United States District Court for the District of Nevada denying Pan Am's motion for a preliminary injunction restraining respondent labor organizations and the individual respondents from picketing Pan Am's operations at the Nuclear Rocket Development Station ("NRDS"), Jackass Flats, Nevada. The Court of Appeals, like the District Court, was of the opinion that the injunction would issue if the Railway Labor Act were applicable to Pan Am's employees at NRDS, but held that the Act was not applicable.

This brief will be concerned solely with the applicability of the Railway Labor Act, not with the propriety of the injunction. It is TWU's position that the Railway Labor Act applies to Pan Am's employees at NRDS, as the National Mediation Board ("NMB") recently determined, consistently with its prior determination, affirmed on review, that Pan Am's employees at space installations have common employment interests with its employees at airline installations, so that, as "employees" within the meaning of the Railway Labor Act, they are subject to the statutory dispute-settlement procedures designed to avoid any interruption to interstate and foreign transportation resulting from unsettled disputes between carriers and their employees.

TWU'S INTEREST

In 1950 TWU was certified by the NMB as the sole and exclusive system-wide collective bargaining representative under the Railway Labor Act [45 U. S. C. §§151-188 (1958)] for the craft or class of mechanics and ground service personnel employed by Pan Am. NMB Case No. R-2225 (App. 33a[1]). The certification has continued in full force and effect, and a single, system-wide collective bargaining agreement has also been in continuous effect between Pan Am and TWU, governing the wages, hours and working conditions of all of the employees in the same craft or class.

The 1950 certification was but a reaffirmance of an earlier NMB certification issued to TWU on September 24, 1945, covering the same employees. NMB Case No. R-1451.[2] Thus, continuously since December 18, 1945, Pan Am's mechanics and ground service personnel employed in the continental United States, Alaska, Honolulu, Puerto Rico, Virgin Islands and the Canal Zone have been covered by an agreement with TWU. There have been many modifications, but the agreement has never been terminated. The most recent modifications became effective October 5, 1962.

In 1956 the NMB clarified TWU's certification, determining and ruling that it covered the mechanics and ground service employees in Pan Am's Guided Missile Range Division employed at the Government's guided missile base at Cape Kennedy (formerly Cape Canaveral), Florida, where, under contract with the United States Air Force

[1] The "App." references are all to Appendix A of the Petition.

[2] This certification is referred to in the record (R. 194).

since about March 1954, Pan Am performs technical and base maintenance services. NMB File Nos. C-2202, C-2505 (App. 23a, 32a). The National Labor Relations Board ("NLRB") acquiesced in that assertion of jurisdiction. *Pan American World Airways, Inc.*, 115 N. L. R. B. 493 (1956). The "asserted jurisdiction" was judicially approved as "not only lawful but compulsive" under the Railway Labor Act in *Biswanger* v. *Boyd*, 32 CCH Lab. Cas. ¶70,840, 40 L. R. R. M. 2267 (D. D. C. 1957)—a proceeding in which TWU participated as intervenor.[3]

Pan Am has since recognized TWU as the bargaining representative of its employees covered by the NMB certification wherever employed throughout the United States, whether at airline or space installations, including the Electronic Environmental Test Facility at Fort Huachuca, Arizona (since March 1960), as well as at NRDS (since June 1963). At these installations, as at Cape Kennedy, Pan Am performs technical and base maintenance services under contract with a Government agency—the United States Army, at the Arizona facility, and at NRDS, the Atomic Energy Commission ("AEC"), which, with the National Aeronautics and Space Administration, created the Space Nuclear Propulsion Office—Nevada Extension to manage NRDS, a facility devoted to the research and development of nuclear rocket engines and vehicles for interplanetary travel.

After Pan Am entered into its contract with the AEC for services at NRDS, certain of respondent unions peti-

[3] The background facts of these administrative and judicial rulings are set forth in the Petition (pp. 5-7).

tioned the NLRB for certification as the collective bargaining representative of employees included in the craft or class covered by TWU's certification. The NMB thereupon informed the NLRB and all interested parties that it viewed the controversy as one requiring it to clarify its certification and held a hearing on August 20 and 21, 1963, confined to the question of jurisdiction. On October 29, 1963, the NMB determined that Pan Am and its mechanics and ground service employees at NRDS are, respectively, a "carrier" and "employees" within the meaning of the Railway Labor Act and that the NMB, not the NLRB, has jurisdiction over them. NMB File No. C-3367 (App. 40a).

This NMB determination was not directly reviewed by the Court of Appeals, nor by any court; and, of course, the Court of Appeals did not directly review the prior NMB determinations. The NMB determinations, therefore, remain in effect. However, TWU, having participated in the proceedings leading to the prior administrative and judicial determinations, is obviously interested in making its views known to this Court in the consideration of whether or not to grant certiorari to review a decision which conflicts with those determinations and which, after seven years of certainty thereunder, creates uncertainty in the application of TWU's and the petitioner's system-wide collective bargaining agreement to space installations, where petitioner performs services under contracts with the Air Force, Army and AEC.

ARGUMENT

1. The Decision of the Court of Appeals That the Railway Labor Act Does Not Apply to Pan Am and Pan Am's Employees at NRDS Conflicts Directly With Prior Decisions of the NMB and Thereby Creates Confusion and Uncertainty With Respect to the Administration of the Act and the Application of Collective Bargaining Agreements Under the Act; Therefore, the Writ Should Be Granted.

The NMB ruling in 1956, that Pan Am's mechanics and ground service employees at Cape Kennedy were within the coverage of the Railway Labor Act and the jurisdiction of the NMB, was accepted by the NLRB and approved by the District Court for the District of Columbia on direct review, as already noted (p. 4). No further appeal was taken, and that ruling, unchallenged prior to the decision of the District Court of Nevada in this case, has become an accepted aspect of the NMB's administration of the Act. *Administration of the Railway Labor Act by the National Mediation Board, 1934-1957* 7 (1958).

Even after the decision of the District Court of Nevada, the NMB reaffirmed its construction and application of the Act on October 29, 1963, as noted previously (p. 5), ruling that Pan Am's employees at NRDS are likewise subject to the Act. The Court of Appeals was advised of that determination after its opinion had been written, but expressly adhered to its opinion, noting that the NMB had relied on its Cape Kennedy ruling, which the Court said "does not seem persuasive" (App. 12a, 15a).

Although the Court of Appeals did not directly review the NMB decisions affecting Cape Kennedy or even NRDS, there is more than an inconsistency in dicta or in general principles between the Court's and the NMB's decisions—there is a direct and conscious conflict on the same matters of fact and law.

The conflict is hardly academic. Confusion and uncertainty with respect to the administration of the Railway Labor Act and the application of collective bargaining agreements under that Act are among the consequences of this conflict. Thus, within a month after the Court of Appeals handed down its decision, respondent Building & Construction Trades Council filed a representation petition with the NLRB with respect to other Pan Am employees at NRDS covered by TWU's certification from the NMB, just as certain other respondent unions had done in July 1963, thereby precipitating the hearing before the NMB on the question of jurisdiction and the determination by the NMB on October 29, 1963.

TWU's position that its system-wide certification and contract under the Railway Labor Act cover such accretions to Pan Am's operations, is not unique. The International Brotherhood of Teamsters (Local 631 of which is one of the respondents) and the Brotherhood of Railway and Steamship Clerks also hold NMB system-wide certifications and Pan Am system-wide contracts which have been applied to Pan Am's Guided Missile Range Division.

If for no other reason, the writ should be granted to settle the confusion and uncertainty created by the conflict between the decision of the Court of Appeals on the applica-

bility of the Railway Labor Act and the prior determinations of the NMB, the agency charged with the administration of that Act. *Cf. United States* v. *Ruzicka*, 329 U. S. 287, 288, 295 (1946); *Rothiensis* v. *Electric Storage Battery Co.*, 329 U. S. 296, 299 (1946).

2. The Court of Appeals, in Holding That Pan Am and Pan Am's Employees at NRDS Are Not Subject to the Railway Labor Act, Improperly Failed to Give Any Weight to the Prior Interpretation and Factual Determinations by the NMB and Incorrectly Decided a Question of Federal Law Important to Labor Peace in the Air Transportation Industry; Therefore, the Writ Should Be Granted.

In holding that the Railway Labor Act does not apply to Pan Am and its employees at NRDS, the Court of Appeals made the following statement:

> "In our instant case, Pan American's operation at the Nuclear Research [*sic*] Development Station where the labor troubles with which we are concerned occurred, had nothing to do with transportation by air or by rail. . . ." (App. 6a)

From this summary statement, it is altogether apparent that the Court of Appeals gave no weight to the NMB's interpretation of the Railway Labor Act, although an administrative agency's interpretation of its governing statute is entitled to "great weight." *United States* v. *American Trucking Ass'ns, Inc.*, 310 U. S. 534, 549 (1940); *California Co.* v. *Udall*, 296 F. 2d 384, 388 (D. C. Cir. 1961); *West Texas Util. Co.* v. *NLRB*, 184 F. 2d 233, 235 (D. C. Cir. 1950), *cert. denied*, 341 U. S. 939 (1951).

The Court of Appeals also stated summarily:

> "... We do not have here a problem of determining whether the relationship of these employees to transportation is 'tenuous,' 'remote' or 'negligible.' In our case the relationship is non-existent. ..." (App. 10a; footnote omitted).

Thus, it is also apparent that the Court of Appeals gave no weight to the prior and contrary determinations of the NMB, reached after hearings and upon briefs, that the relationship between Pan Am's activities at space installations and its activities at airline installations is not so "remote" or "tenuous"—that the former activities are "part and parcel of Pan American" (App. 31a, 38a). Yet, such *factual* determinations by an administrative agency are probably not subject to judicial review. *Cf. Switchmen's Union* v. *NMB*, 320 U. S. 297 (1943), and cases decided therewith. In any event, judicial review would be limited to the narrow question whether the findings are supported by substantial evidence on the whole record, even if the findings "be considered more legal than factual in nature." *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U. S. 504, 508 (1951); *cf. Cardillo* v. *Liberty Mut. Ins. Co.*, 330 U. S. 469, 478 (1947).

The Court's decision has the anomalous result that Pan Am's employees at space installations and its employees at airline installations, although they have similar skills and do similar work, will be subject to different labor laws. Moreover, the Court's decision has the crucial consequence that unsettled labor disputes at Pan Am's space installations will not be subject to the dispute-settlement procedures of the Railway Labor Act and will, therefore, threaten interruption to operations at Pan Am's airline installations.

The Court of Appeals Misconceived the NMB's Interpretation of the Act

A major rationale for the NMB's reading of the Railway Labor Act is that the withdrawal of any segment of an air carrier's operations from the coverage of the Railway Labor Act is deleterious not only to the segment of the operation denied coverage, but also to the over-all operation, for no segment is insulated from another, from the standpoint of labor relations. The NMB reasoned realistically that a labor dispute at Cape Kennedy, or at NRDS, could easily proliferate so as to threaten interruption to the transportation operations of Pan Am, and that if the Railway Labor Act were not applicable, the dispute-settlement procedures prescribed by that Act would not be available;

> "... If picket lines were then to be established, it is reasonable to suppose that the main offices and air bases would be picketed. What effect would such picketing have upon the functioning of Pan American World Airways as a common carrier of persons or property?" (App. 30a[4])

The Court's reaction, admittedly "hypothetical" (App. 9a), was as follows:

> "It would seem, then, that the same problem of interpretation and application of the pertinent statutes would be presented, if Pan American's management had acquired and were operating a shoe factory for profit. Would the employees in that factory be obliged to comply with the waiting periods and mediation provisions of the Railway Labor Act before they would be free to do what the employees in a

[4] These and the other compelling observations of the NMB are excerpted in the Petition (pp. 14-16).

clothing factory across the street from them were guaranteed the right to do, viz. to strike if they were not bound by contract not to strike?

> "The purpose of the restrictive provisions of the Railway Labor Act is to keep transportation moving. If the Act has the effect of keeping employees in a shoe factory working against their will, it would seem that the effect of the Act is not coincident with its purpose. . . ." (App. 6a-7a)

It is evident the Court of Appeals misconceived the NMB's interpretation, for even "if the Act has the effect of keeping employees in a shoe factory working against their will," the effect of the Act would nevertheless be "coincident with its purpose" if at the same time interstate transportation were kept moving. The Court of Appeals seems to be of the opinion that employees covered by the amended National Labor Relations Act [29 U. S. C. §§151-168 (1958)] invariably enjoy greater advantages than those covered by the Railway Labor Act. It is TWU's opinion only that the Acts are different and that neither Act is perfect.

There can be no question that the function of the NMB under the Railway Labor Act, unlike that of the NLRB under the National Labor Relations Act, goes further than promoting and protecting employees' representation rights. Under the Railway Labor Act, in the event of a dispute between a carrier and a union concerning rates of pay, rules and working conditions which the parties cannot settle, they "are required to submit to the successive procedures designed to induce agreement," lest the dispute interrupt interstate transportation. *Elgin, J. & E. Ry.* v. *Burley*, 325 U. S. 711, 725 (1945). It was for the very purpose of

extending these procedures to air carriers and their employees that they were withdrawn from the coverage of the National Labor Relations Act, *which was originally applicable to them*, and brought within the terms of the Railway Labor Act.

The advisability of this extension was discussed at hearings held on May 20 and June 4, 1935, before a subcommittee of the Senate Committee on Interstate Commerce. The need for the extension was specifically questioned in view of the protection afforded by the National Labor Relations Act, but the desirability of the additional facilities of mediation, arbitration, and emergency board fact-finding was stressed. Hearings before Subcommittee of Senate Committee on Interstate Commerce on S. 2496, 74th Cong., 1st Sess. 6, 8-9, 25-27 (1935). The Senate and House Reports are in accord. S. Rep. No. 895, 74th Cong., 1st Sess. (1935); H. R. Rep. No. 2243, 74th Cong., 2d Sess. (1936).

Section 206 of Title II of the Railway Labor Act [45 U. S. C. §186 (1958)] provided, therefore:

> "*All* cases referred to the National Labor Relations Board, or over which the National Labor Relations Board shall have taken jurisdiction, involving *any* dispute arising from *any* cause between *any* common carrier by air engaged in interstate or foreign commerce . . . and employees of such carrier or carriers, and unsettled on the date of approval of this Act, shall be handled to conclusion by the Mediation Board. . . ." (Emphasis added)

The National Labor Relations Act is equally unqualified in its exclusion of air carriers from its coverage. Section 2(2) excludes "*any* person subject to the Railway Labor Act" from the definition of "employer," and Section 2(3)

excludes "*any* individual employed by an employer subject to the Railway Labor Act" from the definition of "employee." (Emphasis added.) 29 U. S. C. §152 (2) (3) (1958). It is significant that both exclusions are stated in terms of the employer's, not the employee's, identity.

The language of these Acts could not be clearer. There is no room for interpolating into such language any qualification in terms of the relationship of the employees' particular activity to the carrier's over-all activity.

In reaching its contrary conclusion, the Court of Appeals put some reliance on *California* v. *Taylor*, 353 U. S. 553 (1957).[5] Yet, this Court held unanimously in that case that the Railway Labor Act applied to a state-owned rail carrier, although it was argued "that the Act was inapplicable . . . because a federal statute is presumed not to restrict a constituent sovereign State unless it expressly so provides." *Id.* at 562. In so holding, this Court stressed "[t]he fact that Congress chose to phrase the coverage of the Act in all-embracing terms" and the fact that "Congress . . . has provided, by the Railway Labor Act, [dispute-settlement] techniques peculiar to that industry," a "primary purpose of this machinery" being, as set forth in the Act, "[t]o avoid any interruption to commerce or to the operation of any carrier engaged therein." *Id.* at 564, 566. These are the very facts TWU stressed, and the NMB relied on, in the Cape Kennedy and NRDS cases.

Thus, as this Court recognized in *California* v. *Taylor*, *supra*, legislative history supports an extensive, not a re-

[5] The Court of Appeals relied principally on *Jackson* v. *Northwest Airlines, Inc.*, 70 F. Supp. 501 (D. Minn. 1947), *aff'd in part and rev'd in part*, 185 F. 2d 74 (8th Cir. 1950), *cert. denied*, 342 U. S. 812 (1951), discussed in the Petition (pp. 21-22).

strictive, coverage of the Railway Labor Act, in the interest of uninterrupted interstate transportation. The NMB's interpretation likewise recognizes that among the intended beneficiaries of this Act of Congress are not only the parties, but also the public.

The Court of Appeals Disregarded the NMB's Factual Determinations

The NMB did not rest with a literal reading of the Railway Labor Act, in implementation of the policy of the Act. The literal application of the Act was only the NMB's logical point of departure.[6] It then proceeded to make factual determinations supporting the community of interest shared by Pan Am's airline installation and space installation employees. The Court of Appeals, in its concern for hypothetical shoe factory employees, gave no weight to the NMB's determinations concerning actual NRDS and Cape Kennedy employees.[6]

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[6] The Court of Appeals assumed (1) that the actual NRDS employees and the hypothetical shoe factory employees are equivalent and (2) that the Railway Labor Act would never apply to the latter. The Court relied, *inter alia*, on the definition of "carrier" in the Act, which includes any company controlled by a carrier if that company engages in transportation or related services. 45 U. S. C. §151 First (1958). Obviously by this provision Congress intended only to *extend*, not restrict, application of the Act and thereby prevent its circumvention. If a subsidiary of Pan Am were organized to engage exclusively in shoe manufacturing, presumably, like any other shoe manufacturing corporation, it would not be subject to the Act. Pan Am itself has yet to go into the shoe manufacturing business, and the NMB has yet to rule that the Act is applicable to shoe manufacturing engaged in by any other "carrier." However, should the NMB ever do so, in literal application of the Act *and* upon factual determinations of the kind made with respect to space installations, it would seem that "the remedy," if a remedy is indicated, "is legislative." *Cf. Baltimore & O. R. R.* v. *Kepner*, 314 U. S. 44, 54 (1941).

It has been the NMB's consistent conclusion, based on common employment interests—the history of bargaining; the nature of the employees' skills, duties and working conditions; and the organization and management of the employer's operations—that the whole of Pan Am's present system should be treated as a unit for labor relations purposes. That conclusion, first reached in 1956 and recently reaffirmed, constitutes an exercise of expert discretion for which both the NMB and NLRB, within their respective spheres, were created.

If that conclusion is incorrect, then the NMB could not act with respect to NRDS and Cape Kennedy, and the NLRB could not act *except* with respect to NRDS and Cape Kennedy. To divide Pan Am in this way between the NMB and NLRB would have the result that neither agency could cope effectively with the carrier's employee relations problems. It would have the further result that employees of the same employer, having the same or similar skills and doing the same or similar work, would enjoy different rights and be subject to different restrictions in their relations with management. Such a result can only invite instability in labor relations.

To review and correct this decision of the Court of Appeals on a question of federal law important to the parties and the public alike, the writ should be granted.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be granted.

Dated: New York, New York,
January 13, 1964.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, *et al.*,
Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF BUILDING AND CONSTRUCTION TRADES COUNCIL, ITS AFFILIATED UNIONS, AND TEAMSTERS UNION LOCAL NO. 631

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Respondents.

On Petition For a Writ of Certiorari to the United States Court of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION OF BUILDING AND CONSTRUCTION TRADES COUNCIL, ITS AFFILIATED UNIONS, AND TEAMSTERS UNION LOCAL NO. 631

To the Honorable Earl Warren, Chief Justice of the United States and to the Honorable Associate Justices of the Supreme Court of the United States:

OPINIONS BELOW

The opinion of the Court of Appeals is reported in 234 F. 2d. 217 and in 54 L.R.R.M. 2487. The opinion of the District Court (Petition for Writ, App. A, pp. 16a-22a) is still unreported.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

1. Whether a United States District Court or Court of

Appeals, required to decide the applicability of the Railway Labor Act to the non-transportation employees of an air carrier in order to determine its own jurisdiction under the Norris-LaGuardia Act to enjoin peaceful picketing by such employees pursuant to a labor dispute, is bound by a National Mediation Board precedent interpreting the RLA to apply to non-transportation employees of the carrier at another installation performing substantially similar duties, if the Court is convinced, on the basis of statutory, judicial, and administrative authority that the NMB has misinterpreted its jurisdiction under RLA as a matter of law?

2. Whether title II of the Railway Labor Act (45 U.S.C. § 181, *et seq.*) applies to the employees of a carrier by air at an installation geographically remote from the carrier's air terminals, and at which neither the carrier nor its employees are performing any functions in any way connected with air transportation, merely because the craft skills of such employees are substantially identical to the craft skills of other employees at the carrier's airline terminals?

STATEMENT OF THE CASE

1. Nature of the Labor Dispute

For approximately twelve years prior to July 15, 1963, Respondent Building and Construction Trades Council (BCTC) and its affiliated unions, manned the jobs of the various Atomic Energy Commission (AEC) contractors at the Nevada Test Site, under collective bargaining agreements with such contractors. These contractors included Reynolds Electrical & Engineering Co. (REECO), the AEC support contractor performing various housekeeping, construction, and technical services both at the Nuclear Rocket Development Station (NRDS), formerly called "Area 400" —and at the weapons testing area of the Test Site, located some twenty-six miles away (Arnold Afft., R 111-115; R 275).

The wage scales prescribed by these labor agreements

were certified by the United States Department of Labor as the "prevailing wages" for the Southern Nevada Area under the Davis-Bacon Act, 40 U.S.C. § 276(a). (Arnold Afft. R 112).

On July 15, 1963, Pan American World Airways, Inc. (Pan American) replaced REECO as the support contractor in the NRDS area under a contract dated June 28, 1963 (Arnold Afft., R 112; R 17, P's Exh. "A"), between Pan American and the Space Nuclear Propulsion Office (SNPO), a joint administrative agency of AEC and NASA, created to carry on development of nuclear reactor engines and vehicles for interplanetary space travel (R 2-3).

All members of Respondent unions, many of whom had worked at the Test Site from its inception, were replaced by Pan American with new employees (Arnold Afft., R 113) who, in the main, were recruited in Arizona, New Mexico, Texas, and elsewhere (Arnold Supp. Afft. R 335). Although Petitioner's new employees performed substantially the same work as had been performed by REECO's local union employees until July 15, 1963 (R 335-336), their wage rates ran from $1.65 to $2.00 per hour less than the wage rates prescribed by the labor agreement between Respondent unions and REECO, which had been recognized by the Department of Labor as "prevailing wages" for the area. (R 112, compare BCTC wage rates at R 116 with Pan American-TWU wage rates, R 17; P's Exh. "A"—See also R 249).

Pan American sought to justify these lower wage rates on the ground that they had been prescribed by a labor agreement between Pan American and Transport Workers Unions of America, AFL-CIO (TWU), signed September 14, 1962 (R 17; P's Exh. "A"), many months before Petitioner had even submitted a bid to render support services at NRDS.[1]

[1] Although the September 14, 1962 agreement between Pan American and TWU, covering airline mechanics and ground service

On July 30, 1963, the unions affiliated with Respondent BCTC, with the sanction of BCTC, commenced to picket Petitioner Pan American in the NRDS area of the Nevada Test Site to protest "government interference" and replacement of local union men by Pan American with employees receiving "sub-standard wages." (Arnold Afft. R 113). No claim to represent the current employees was made by the picketing unions, since the unions did not represent Pan American's new employees. (Arnold Afft. R 114-115). It is not suggested that the picketing was anything but peaceful and orderly. The picket signs were directed exclusively against Pan American's operations at NRDS, and not against any other AEC contractor either at NRDS, or in the weapons testing area of the Test Site (Arnold Afft. R 114).

2. Proceedings in the District Court

On July 31, 1963, Petitioner filed a Complaint in the United States District Court for the District of Nevada, to enjoin the picketing. Apparently anticipating a defense under the Norris-LaGuardia Act (29 U.S.C. 101, *et seq.*), Petitioner pleaded facts tending to show that Petitioner was a carrier within the Railway Labor Act (RLA), (45 U.S.C. § 151, *et seq.*), that the National Mediation Board (NMB) had jurisdiction of the dispute under the RLA, and that the picketing was in furtherance of a representation dispute and an interference with the processes of RLA (R 1-16).

After an informal conference, but without a hearing, the District Court issued a temporary restraining order and an order to show cause, returnable August 2, 1963 (R 240; R 48-53).

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employees, was obviously negotiated in the light of economic and industrial conditions existing at Pan American's airline bases and in its Guided Missiles Range Division (GMRD) at Cape Canaveral (Cape Kennedy), Florida, in conformity with the Railway Labor Act (RLA) scheme of system-wide labor agreements for each craft

At the hearing on August 2nd., Respondents introduced in evidence as their Exhibit "A", Appendix B of the contract of June 28, 1963 between SNPO and Petitioner, which defined the scope of Petitioner's work at NRDS (R 300-305). Respondents also put on the stand Petitioner's Project Manager, R. L. Yordy. Both the Exhibit and Mr. Yordy's testimony showed, without substantial dispute, that in its support activities at NRDS, Petitioner was not performing any functions either directly or indirectly related to its air transportation business (R 300-305, Testimony of Yordy; R 260-299), and that functions being performed by Petitioner at NRDS and the classifications of employees used were substantially identical to those at Cape Canaveral (R. 284). Petitioner made no attempt to rebut this evidence, but introduced in evidence only the NMB's 1956 decision in NMB File No. C-2505, extending its 1950 certification to include Petitioner's ground maintenance employees at Cape Canaveral, and certain telegrams purporting to show that NMB had intervened in the NRDS dispute.

Upon this evidence, the District Court found that the activities of Pan American at NRDS bear only a "tenuous, negligible and remote relationship to Pan American's commercial transportation activities"[2] and concluded that, with respect to its NRDS activities, Petitioner is not a "carrier" covered by the RLA (45 U.S.C. § 181); that, consequently, there is no occasion for considering whether the Norris-LaGuardia Act must be "accommodated" to the

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or class of employees, it provided that it should extend to all Pan American's operations (R 17; P's Exh. "A"). See "Understanding" and "Letter of Agreement" following page 57 of the September 14, 1962 Agreement).

[2] See District Court's Opinion (Petition, App. A., p. 22a)
On the same evidence, the Court of Appeals found that "We do not have here a problem of determining whether the relationship of these employees to transportation is 'tenuous', 'remote', or 'negligible'. In our case the relationship is non-existent." (Pet., App. A, p. 10a).

purposes and processes of RLA; and that, by reason of the withdrawal of jurisdiction from Federal Courts under the Norris-LaGuardia Act, the Court is without jurisdiction to enjoin peaceful picketing in the course of a labor dispute.[3] (Decision of District Court, Petition, Appendix A, pp. 16a-22a.) Accordingly, the Court denied the preliminary injunction and dissolved the temporary restraining order.

Petitioner immediately filed Notice of Appeal, and applied under FRCP 62(c) for an injunction pending appeal. Over objection of Respondents that the District Court, having determined that it was without jurisdiction to grant a preliminary injunction, was also without jurisdiction to grant an injunction pending appeal, the Court restored the temporary restraining order for a limited period of ten (10) days to enable Petitioner to make such application before the Court of Appeals under FRCP 62(g). (Docket Entry, R 175.)

3. Proceedings Before the Court of Appeals

On August 8, 1963, Petitioner applied to the Court of Appeals, pursuant to FRCP 62(g), for an injunction pending appeal, and, on the same day, the Court granted a temporary injunction valid until hearing and determination of the motion (R 135-137). The application was opposed (R 239-344). After oral argument on August 15th, the Court granted an injunction pending appeal (R 345-347). The appeal was argued on its merits on October 10, 1963 before Madden, Judge of the Court of Claims, and Hamlin and Browning, Circuit Judges (R. 353).

On November 5, 1963, in an Opinion written by Judge

[3] It can hardly be doubted that the picketing involved was within the protection of Section 4 of the Norris-LaGuardia Act (29 U.S.C. § 104). See *Marine Cooks & Stewards* v. *Panama S.S. Co.* (1960), 362 U.S. 365, 4 L. Ed. (2d) 797, 80 S. Ct. 779, Reh. Den. 363 U.S. 809; *Afran Transport Company* v. *National Maritime Unions*, 169 F. 2d. 416, 422-423 (1958).

Madden, former Chairman of the National Labor Relations Board, the Court of Appeals held the RLA inapplicable to the non-transportation activities and the non-transportation employees of Pan American at NRDS and affirmed the decision of the District Court that it was without jurisdiction, under the Norris-LaGuardia Act, to enjoin peaceful picketing at that facility (R 355-364, Petition, App. A, 2a-15a).

On December 3, 1963, Petitioner presented an *ex parte* application to Judge Hamlin for a Stay of Mandate pending application to the Supreme Court for a Writ of Certiorari, and should that be granted, then until ten (10) days after disposition of such review. A number of affidavits in support of this application was filed (R 366-396; Pet. App. C., pp. 62a-78a). The stay was issued *ex parte* (R. 398-400). Thereafter, Respondents moved to strike from the Record on Petition for Certiorari the application for stay and supporting affidavits (R 402-410). The Court of Appeals denied the motion, stating that "while such application and affidavits were not before the Court at the time of its decision they are a part of the history of the case." (R 411).

So, although the District Court held on August 2, 1963 that it was without jurisdiction to issue an injunction against peaceful picketing by Respondent unions, and although the Court of Appeals affirmed this decision on November 5, 1963, Respondents have, nevertheless, been continuously enjoined from such picketing from July 31, 1963 to the present date.

4. Proceedings before the National Mediation Board.

At the District Court hearing, Petitioner introduced, over objection, certain telegrams pertaining to an earlier representation dispute between Pan American and Culinary Workers Union, Local No. 226 (Culinary Union) (R 177, unattached Exhibits), which is not affiliated with Respondent BCTC (R 111).

Respondent BCTC and its affiliated unions first learned of the intention of NMB to hold a hearing at a time certain on the question of its jurisdiction over Pan American employees at NRDS through a telegram from the Board dated August 7, 1963 (five days after the District Court hearing and decision) setting August 20, 1963 as the NMB hearing date (Afft. of Murray Gartner R 192-193, R 207).

Respondents advised NMB that they were making no claim of representation, informed NMB of the District Court's decision holding RLA inapplicable of NRDS, and took the position that the question of NMB's jurisdiction had been resolved by that decision. (Appendix A, Exh. A-1).

On August 20 and 21, NMB, nevertheless, proceeded with a hearing in which Respondents participated under protest. Respondents took the position that the Board hearing was premature as to Respondents, since they had made no claim to represent Pan American employees at NRDS, and that the Board was without jurisdiction over the NRDS employees in any event, by reason of the authorities relied on by the District Court in its decision. (Appendix A, Exh. A-1).

NMB, though advised that a review of the District Court's decision was pending before the Court of Appeals for the Ninth Circuit and though requested to withhold its ruling pending the decision of the Court of Appeals (Appendix A, Exh. A-4), rendered its ruling on October 29, 1963 (Pet., App. A, pp. 40a-43a). Stating its conclusions only, and citing no authorities, the NMB found that Petitioner and its employees were "respectively a carrier and employees within the meaning of the Railway Labor Act" with respect to Petitioner's NRDS operation, because of "a functional relationship to the over-all operations of this carrier." (Pet., App. A, pp. 40a-43a).

The Board decision having been called to the attention of the Court of Appeals by Petitioner after the Court

had written, but before it had filed, its Opinion (Pet., App. A, p. 15a), the Court took note of the Board's decision in the following words:

> "The Board stated no reason for its conclusions except the reason given it in the Canaveral Case, discussed in our opinion. We adhere, therefore, to what we had decided before receiving the advice referred to above."

Since rendition of the opinion of the Court of Appeals, Respondents have requested the NMB to reconsider its decision in the light of that opinion (App. A, Exhs. A-4, A-5, A-6 and A-7). However, the Board has not, thus far, indicated its disposition in the matter (App. A, Exh. A-8).

5. Proceedings Before the National Labor Relations Board

On December 5, 1963, one month after rendition of the opinion of the Court of Appeals, Respondents BCTC and Teamsters Union filed a Petition with the National Labor Relations Board, asking to be certified as bargaining representatives of all maintenance, operation, and support employees of Pan American at NRDS (excepting only office employees). (App. A, Exh. A-9.)

The NLRB has withheld action on this petition, apparently pending disposition of the present proceeding before the Supreme Court. The apparent reason for this delay is the Board's uncertainty as to whether NLRB or NMB has jurisdiction over Petitioner's NRDS employees. (App. A, Affidavit of George Rudiak.)

SUMMARY OF RESPONDENTS' ARGUMENT

Respondents, Building and Construction Trades Council, (BCTC), its affiliated local unions, and Teamsters Union Local No. 631 (Teamsters Union), respectfully oppose the Petition for Writ of Certiorari, on the following grounds:

1. That a decision of an administrative agency, such as

the National Mediation Board, which is plainly wrong as a matter of law, and which was made without giving the parties an opportunity to present oral argument to the members of the Board and which does not state reasons, findings or conclusions on the material issues of fact and law presented on the record, contrary to good principles of administrative procedure as embodied in the Administrative Procedure Act, is not the kind of administrative practice which warrants a variation from the language of the applicable Federal statute. Nor does the overruling of such administrative decision by a unanimous Circuit Court of Appeals present the kind of question calling for the issuance of the Writ of Certiorari by the Supreme Court of the United States.

2. That the Court of Appeals, affirming the District Court, has correctly decided the question of Federal law in conformity with judicial and administrative precedent, in a manner consonant with both the express language and the evident purpose of the Railway Labor Act (45 U.S.C. 151, *et seq.*).

3. That there is no conflict in decisions between the decision of the Court of Appeals and any decision of the Supreme Court or any other Court of Appeals.

4. That the judgment sought to be reviewed is an interlocutory judgment, denying Petitioner's application for a preliminary injunction, and that no over-riding necessity has been shown such as would warrant a departure from the usual reluctance of this Court to review non-final judgments on certiorari.

5. That the effect of the decision below is to delimit the jurisdiction of the National Mediation Board so as to prevent unwarranted encroachment by that Board upon the area of regulation allotted by Congress to the National Labor Relations Board.

6. That the labor dispute which is the subject matter of this litigation may be regulated without danger to the nation's interplanetary space program through the processes of the National Labor Relations Board in such manner as to effectuate the Congressional policy under the Labor Management Relations Act of permitting employees to bargain collectively through representatives of their own choosing, rather than being compelled, through a strained construction of the Railway Labor Act, to treat with their employer through a bargaining agent not selected by them and to accept terms and conditions of employment to which they have not assented.

REASONS WHY THE WRIT SHOULD BE DENIED

1. There Is No Conflict of Decisions. On the Contrary, the Court of Appeals Correctly Decided the Question of Federal Law is Conformity with the Weight of Judicial Administrative Precedent, and in Harmony with Principles Enunciated by the Supreme Court.

In affirming the District Court's order denying Pan American's motion for a preliminary injunction, the Court of Appeals cited as "directly in point" the decision of the District Court of Minnesota in *Jackson* v. *Northwest Airlines*, 70 F. Supp. 501 (1947), and quoted with approval the following language therefrom quoted in the affirming opinion of the Court of Appeals for the Eighth Circuit, *Northwest Airlines* v. *Jackson*, 185 F. 2d. 74 (1950):

> "The Railway Labor Act was intended to apply only to transportation activities and that work which bears more than a tenuous, negligible and remote relationship to the transportation activities. It was not intended to apply to all work, regardless of its connection to transportation, merely because the company carrying on the work included carrier activities within its company functions."

The decision below is also in direct accord with an earlier Ninth Circuit decision in *Anderson* v. *Bigelow*, 130 F. 2d. 460 (1942) (not cited in the opinion below), where an injunction was denied under the Norris-LaGuardia Act because of inapplicability of the Railway Labor Act to the independent over-the-road trucking operation of a railcarrier then in Federal Receivership. It is in harmony with the Second Circuit decision in *Walling* v. *The Connecticut Company*, 154 F. 2d. 552 (1946), with the District Court decision in *Roland* v. *United Airlines*, 75 F. Supp. 25 (1947) and finds support in principle in the following rulings of the National Labor Relations Board, Interstate Commerce Commission, and National Mediation Board: *Northwest Airlines, Inc.* 47 NLRB 498, 12 LRRM 10 (1943); *Hudson and Manhattan Railroad Co. Employees-Railway Act*, 245 I.C.C. 145, and *File No. R-2546, Vol. II NMB Craft or Class Determinations*, page 68.

The holding below is also in harmony in principle, if not in decision, with doctrine long enunciated by this Court. Thus, in *Kansas City S.R. Co.* v. *United States*, 282 U.S. 761, 764, 75 L. Ed. 684, 686 (1931), this Court said:

> "There is no doubt that common carriers subject to the Interstate Commerce Act may have activities which lie outside the performance of their duties as such common carriers and are not subject to the provisions of the act."

And, in *Virginian R. Co.* v. *System Federation*, 300 U.S. 315, 81 L. Ed. 789, 57 S. Ct. 592, in holding that the commerce power was broad enough to sustain a mandatory injunction requiring a rail carrier to "treat with" its "back shop" employees under Section 2 (Ninth) of the RLA where such employees, though not themselves engaged in interstate transportation, repaired the locomotives and cars used by the carrier in its interstate service and so were physically and functionally a part of that service, this Court first elaborated the "tenuous, negligible, remote" test for deter-

mining whether a sufficiently substantial relationship exists between the transportation and non-transportation activities of the carrier.[4] It was this test which was later applied in *Jackson* v. *Northwest Airlines, supra,* as well as in the administrative rulings of N.L.R.B., I.C.C., and N.M.B., above cited, and by the District Court below.

The decision below is, therefore, in harmony with principles approved by the Supreme Court, with past decisions of the Second, Eighth, and Ninth Circuits, and with a substantial body of administrative precedent. It accords, moreover, with the statutory language and evident purpose of the RLA to regulate labor relations in the rail and air transportation industries in order "to keep transportation moving," (Pet., App. A, p. 7-a), and serves to delimit the permissible sphere of NMB jurisdiction by confining it to transportation activities and those closely and substantially related thereto, thereby preventing an unwarranted encroachment by NMB upon the jurisdiction prescribed by Congress for the NLRB under legislation designed to regulate labor relations in commerce (other than in the air and rail transportation industries). (Labor Management Relations Act, 29 U.S.C. 151, *et seq.*)

In its 1956 Cape Canaveral decision, upon which Petitioner so heavily relies, the NMB arbitrarily dismissed and refused to follow the long line of judicial and administrative precedent holding that the RLA does not apply to the non-transportation activities of a carrier, or such activities as are not closely and substantially related thereto. In its 1963 NRDS decision, the NMB refused to re-examine, but simply

[4] Although the Opinion below regards *Virginian R. Co., supra,* as irrelevant because concerned with the scope of the commerce power rather than with statutory interpretation as to applicability of RLA, we respectfully submit that, if irrelevant, the decision is mainly so only because the Court below found no need to apply the "tenuous, negligible, remote" test to a situation in which a relationship to transportation was completely non-existent.

adhered to its earlier ruling which served to expand unlawfully its own jurisdiction.

The so-called judicial review of the NMB's Cape Canaveral ruling to which Petitioner refers is the one-page opinion in *Biswanger* v. *Boyd*, 32 CCH Labor Cases § 70,840 (not officially reported). Since the union which sought certification by NMB dropped out of the District Court suit before decision, it is, to say the least, questionable to what extent the *Biswanger* case may be regarded as a judicial review of the NMB's Cape Canaveral decisions, since the ultimate parties were different.

At all events, conflict of a Court of Appeals judgment with a random District Court decision, or with an administrative ruling contrary to the general tenor of judicial and administrative authority is hardly sufficient reason for issuance of the Writ. See *U.S.* v. *Constantine*, 296 U.S. 287, 290; *Shapiro* v. *U.S.* 335 U.S. 1, 4.[5]

[5] Amicus Curiae has cited *United States* v. *Ruzicka*, 329 U.S. 287, 288, 295 (1946) and *Rothensies* v. *Electric Storage Battery Co.*, 329 U.S. 296, 299 (1946) as bearing on its contention that the writ should be granted to resolve a conflict between the decision of the Court of Appeals and a prior decision of the agency charged with administration of the act. Neither case supports this contention.

In *Ruzicka*, it was held that the District Court had correctly ruled that where the statute itself provides for initial adjudication of a disputed fact question before the Secretary of Agriculture with provisions for judicial review, a person subject to the act may not dispute such fact issues in a judicial enforcement proceeding brought by the Secretary without having first sought to challenge the factual basis of the claim in administrative proceedings. The Court expressly withheld opinion on whether the District Court should have stayed enforcement proceedings pending an administrative determination, since the application for a stay had been withdrawn. In the case at bar, not only was there no express statutory mandate for a prior administrative determination, but also, the question which the District Court was called upon to resolve was a condition precedent to its own jurisdiction, and one which it could and did decide as a question of law upon undisputed facts. Furthermore, since Petitioner had invoked the equitable powers of the Court, obviously Petitioner would not, and did not,

2. The Judgment Sought to be Reviewed on Certiorari is a Non-Final Judgment Affirming a Denial of a Preliminary Injunction, and so Over-riding Necessity has been Shown to Warrant a Departure from the Usual Reluctance of this Court to Review Non-final Judgments on Certiorari.

In *American Construction Co.* v. *Jacksonville T. & K. R. Co.*, 148 U.S. 372, 384, the Supreme Court said:

> "... this court should not issue a writ of certiorari to review a decree of the circuit court of appeals on appeal from an interlocutory order, unless it is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause."

An example of such extraordinary circumstances, calling for departure from the usual practice of this Court of declining to review non-final judgments on certiorari is to be found in *Youngstown Co.* v. *Sawyer*, 343 U.S. 579, 584-585, where this Court was called upon to review the Constitutional validity of a wartime Presidential order seizing, and subjecting to operation under government control, almost the entire steel industry, in the interest of averting a national steel strike.

Granting the importance of the national space effort being furthered at NRDS, certainly no circumstances of comparable gravity, Constitutional significance, or probable and immediate consequences are to be discerned from the present application.

In the first place, refusal of the Writ by granting finality to the judgment below, would delimit the boundary between

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ask the Court to stay its proceedings to await an NMB determination. The Court was therefore necessarily required to rule. *Rothensies* is even less in point, for it did not involve a question of applicability or jurisdiction under the statute, but a judicial determination of a question of substantive law contrary to the view taken by the administrative agency.

the jurisdiction of NMB and NLRB, and enable NLRB to proceed in its usual manner to determine the appropriate bargaining unit for Pan American's NRDS employees, to hold representation elections, and to certify bargaining representatives. This is the very procedure which Congress contemplated under LMRA for the orderly settlement of what is now a representation dispute. It differs only from what would occur in an NMB-conducted representation proceeding in that under LMRA a locally-oriented craft or multi-craft unit could conceivably result while under RLA a system-wide craft or class unit (in which the 140 local craftsmen involved would be submerged by airline personnel with whom they have no geographic or functional affinity) would be a foregone conclusion.

In the second place though a second consequence of denial of the Writ would be to free Respondents to resume their picketing, such picketing is still not without legal limits. If it transcends peace and good order, a state court may intervene. If it, in fact, threatens the national health or safety, the Presidential emergency procedures prescribed by 29 U.S.C. § 176-§ 180 are available. The NMB is not the only Federal agency competent to cope with the problem. The processes of the NLRB, the Federal Mediation and Conciliation Service, and of the President's Missile and Space Sites Labor Board, created by Executive Order No. *10946*, are equally efficacious.

3. A Court called upon in the first instance to decide the applicability of the Railway Labor Act in order to determine its own jurisdiction to issue a preliminary injunction is not bound by a prior National Mediation Board ruling where the question relates to the extent of the Board's jurisdiction under the statute and is a question of law turning on construction of the statute.

Respondents do not question that, under certain circumstances at least, determinations as to the scope and effect

of a statute by the administrative agency charged with its enforcement are entitled to deference by a reviewing court, at least when they have evidentiary support and are not inconsistent with law. See *United States* v. *Drum*, 368 U.S. 370 (1962); *N.L.R.B.* v. *E. C. Atkins & Co.*, 331 U.S. 398 (1947); *N.L.R.B.* v. *Hearst Publications, Inc.*, 322 U.S. 111 (1944); and *Gray* v. *Powell*, 314 U.S. 402 (1941), cited in Petition for Writ of Certiorari, page 13.

Each of these cases, however, involved a direct judicial review of an administrative ruling, while both Petitioner (Pet., pp. 2, 17) and Amicus Curiae (TWU Brief, p. 5) admit what is apparent—that the case below did not involve a direct judicial review of either the 1956, or the 1963, NMB decisions.[6] To be sure, the Court of Appeals considered the NMB's views "with deference," but did not find them "persuasive." (Pet., App. A, p. 12a).

The question, then, is not as to the degree of conclusiveness which the Court should have given the NMB's Cape Canaveral decision if it had been directly reviewing it in a proceeding brought for that purpose, but the extent to which the Court was bound by such decision as precedent in a judicial proceeding in which the Court, in the first instance, was called upon to determine its own jurisdiction to issue the injunction sought by Petitioner, where such jurisdiction depended upon the statutory construction as to the extent of the Board's authority under the Act over non-transportation employees of a carrier.

In *N.L.R.B.* v. *Hearst Publications*, *supra*, 322 U.S. 111, 130, this Court intimated that a different standard of deference to the administrative ruling may be appropriate in such a case than that required upon direct judicial re-

[6] In fact, the NMB had not even noticed its NRDS hearing when, on August 2, 1963, the District Court held its hearing and made its order finding the RLA inapplicable to NRDS and denying an injunction.

view. The Court said:

> "Undoubtedly, questions of statutory interpretation, especially when arising in the first instance in judicial proceedings, are for the courts to resolve, giving appropriate weight to the judgment of those whose special duty is to administer the questioned statute."

However, in *Hearst Publications*, since the question of whether or not the relationship of employer and employee existed was one which NLRB, rather than the Court, was obliged to determine initially under a broad statutory definition of the term "employee", this was held to be a matter entrusted to the expertise of the Board and the function of the reviewing Court was said to be limited to a determination as to whether the Board's ruling has "warrant in the record" and a reasonable basis in law. In other words, even on a question left to administrative discretion, the ultimate determination as to whether the administrative interpretation had a reasonable basis in law was for the Court. In the case at bar, where the Court was necessarily making the initial determination and the question involved was one of interpretation of the statute on a jurisdictional question, it can hardly be doubted that the Court had the right to make the final decision upon the issue as a question of law, in the light of all applicable precedent, and not of NMB's ruling alone.

Thus, though administrative decisions within the area of discretion conferred upon the agency by Congress are entitled to due weight, the ultimate determination as to whether the agency has acted, or is about to act, without, or in excess of its statutory jurisdiction, is for the courts, even in the absence of express statutory authority for review of such decision. *Leedom* v. *Kyne*, 358 U.S. 184, 43 LRRM 2222 (1958). And actions of the National Mediation Board in excess of jurisdiction are no more impervious to judicial correction or restraint in such circumstances than those of any other agency. *Air Line Dispatchers Ass'n.* v. *NMB*, 189

F. 2d 685, 28 LRRM 2048, *cert. den.* 342 U.S. 849 (1951); *Association for Benefit of Non-Contract Employees* v. *NMB*, 218 F. Supp. 114, 53 LRRM 2085 (1963).

What may be garnered from the authorities is that, even on direct judicial review of decisions made in the first instance by an administrative agency, the ultimate responsibility for determining questions of law (*Securities and Exchange Commission* v. *Chennery Corp.*, 318 U.S. 80, 63 S. Ct. 454; *E. Anthony & Sons* v. *N.L.R.B.*, 163 F. 2d 22, *cert. den.* 332 U.S. 773), and, particularly, questions of jurisdiction involving interpretation as to the limits of the agency's statutory powers (*Addison* v. *Holly Hill Fruit Products*, 322 U.S. 607, 88 L. Ed. 1488, 64 S. Ct. 1215, *reh. den.* 323 U.S. 809; *Cardillo* v. *Liberty Mut. Ins. Co.*, 330 U.S. 469, 91 L. Ed. 1028, 67 S. Ct. 801; *Brannan* v. *Stark*, 185 F. 2d 871 affirmed 342 U.S. 451, 96 L. Ed. 497, 72 S. Ct. 433) is for the courts. And a cognate doctrine is that, even though supported by evidence, an administrative determination of certain fundamental facts bearing upon a constitutional or jurisdictional issue is not conclusive upon the courts, which have the power and duty to exercise their own independent judgment thereon (*U.S.* v. *Idaho*, 330 U.S. 469, 91 L. Ed. 1028 67 S. Ct. 801; *Crowell* v. *Benson*, 285 U.S. 22, 76 L. Ed. 598, 59 S. Ct. 285; *Cox* v. *U.S.*, 157 F. 2d 787, affirmed 332 U.S. 442, 92 L. Ed. 59, 68 S. Ct. 115, *reh. den.* 68 S. Ct. 449) at least in the absence of a specific statutory provision lodging the decision of the jurisdictional question in the agency (*Utah Cooper Co.* v. *Railroad Retirement Board*, 129 F. 2d 35, *cert. den.* 317 U.S. 687).

It is respectfully submitted, therefore, that the NMB's Cape Canaveral decision was given by the Court of Appeals the weight to which it was entitled—that of a precedent to be deferentially considered, but which the Court declined to follow in the belief that it was in error as a matter of law on a question going to the Board's jurisdiction.

4. The Court of Appeals correctly decided that the RLA does not apply to non-transportation employees of an air carrier, notwithstanding that such employees may have the same craft skills and do work substantially identical with that of the carrier's transportation employees, and correctly refused to follow an NMB precedent to the contrary which it regarded as erroneous as a matter of law.

The record made at the hearing in the District Court below, which is the record under review by the Court of Appeals, shows only that the functions performed by Pan American at Cape Canaveral are identical with the functions performed by Pan American at NRDS, and that Pan American uses identical classifications of employees at both facilities (Testimony of Yordy, R 284). The District Court record will be searched in vain for any evidence that the functions performed by Pan American or the classifications of employees used by it at Canaveral and NRDS are identical, or even similar, to functions and classifications at Pan American's airline bases, or that there is interchangeability of personnel between the two types of facilities,[7] or that there are common executive controls and labor policies pertaining to both.

Such assertions in the Petition, and in the Brief of Amicus Curiae, are mere inferences from NMB's 1956 decision finding such community of interests between Petitioner's Cape Canaveral and its airline employees.

Assuming *arguendo* that these inferences find evidentiary support in the District Court record, it is respectfully submitted that they still would not detract from the correctness of the decision below.

(a) The Court of Appeals correctly refused to accept the

[7] In fact, there was minimal interchangeability of personnel even between Cape Canaveral and NRDS. Of the 242 wage-rated employees at NRDS, only 5 transferred from Cape Canaveral (R. 22).

NMB's too-literal and unrealistic construction of RLA, which would have had the effect of extending NMB jurisdiction to every non-transportation activity of an air carrier, in derogation of NLRB's jurisdiction under LMRA. The Court of Appeals thus established a workable rule by which the permissible limits of NMB jurisdiction may be determined.

The Court of Appeals rejected as not "persuasive" the test of statutory coverage used by NMB in its Cape Canaveral decision, where the NMB had said:

> "The test is simple: Is the employer a common carrier by air engaged in interstate commerce? Does the individual perform any work as an employee? If both answers are in the affirmative, the Board's jurisdiction is clear."

Such a literal construction of the statute has been criticized before as "too literal" and "unrealistic." See *Roland* v. *United Airlines, supra*, 75 F. Supp. 25; *Nelson* v. *Aguilines, Inc.*, 70 F. Supp. 495, 500; *Walling* v. *The Connecticut Co., supra*, 154 F. 2d. 552; *Jackson* v. *Northwest Airlines, supra*, 70 F. Supp. 501, 506; and *Northwest Airlines, Inc., supra*, 47 NLRB 498, where, in disposing of a similar argument, the NLRB said:

> "We therefore reject the foregoing argument of the Company which would lead to the result that all activities of a concern are exempt from the provisions of the Act (National Labor Relations Act) if it (the Company) operates to any extent however incidental, as a carrier by air."

Since it is obvious that under the literal test proposed by NMB, that Board could claim jurisdiction over General Motors, if that company, in the course of its widespread operations, should acquire a small commercial airline, as well as claiming jurisdiction over the employees of Pan American's hypothetical shoe factory, it is self-evident that

such a test would be completely unworkable in establishing the permissible outer limits of NMB jurisdiction, and could only result in an unwarranted self-aggrandizement of jurisdiction by NMB at the expense of the NLRB, the agency which intended to regulate labor relations in all but the rail and air transportation industries. The Court of Appeals, therefore, not only construed the express language of RLA correctly, in the light of the evident purpose of the act, to "keep transportation moving," but also with due regard to the purpose of Congress in enacting LMRA. The decision below provides a workable rule for delimiting the operating spheres of NMB and NLRB under the two Acts.

On the other hand, observance of the test proposed by NMB at Cape Canaveral could only result in chaos and confusion as between the two agencies.

Reading the RLA textually, but as a whole,[8] the Court of Appeals noted that the matter is not quite as simple as Petitioner and NMB, in its Canaveral decision, suggest—for the RLA defines an "employee" as one performing such work as is defined as that of an employee by I.C.C., and, obviously, I.C.C. would not be concerned with defining work of any employees other than those "engaged in . . . the transportation of persons or property wholly by railroad," 49 U.S.C. 151. In *U.S.* v. *American Trucking Associations*, 310 U.S. 532, construing Section 13(b) of FLSA, which ex-

[8] In *U.S.* v. *American Trucking Associations*, 310 U.S. 532, 543-544, *supra*, pointing out that "The interpretation of the meaning of statutes, as applied to justiciable controversies, is exclusively a judicial function," and reviewing the canons of statutory construction applied by the courts, this Court condemned the "literal interpretation dogma which withholds from the courts available information for reaching a correct conclusion", and stated further:

> "Emphasis should be laid, too, upon the necessity for appraisal of the purposes as a whole of Congress in analyzing the meaning of clauses or sections of general acts. A few words of general connotation appearing in the text of statutes should not be given a wide meaning, contrary to settled policy, 'excepting as a different purpose is plainly shown.'"

cepts from the provisions of that Act "any employee with respect to whom the Interstate Commerce Commission has power to establish qualifications and maximum hours of service • • • ", this Court, considering the historical policy of Congress to regulate "transportation employees in matters of movement and safety only" refused to interpret the word "employee" as used in Section 204(a) of the Motor Carrier Act, 1935 to include as I.C.C.-regulated employees, exempt from coverage under FLSA, certain non-transportation employees of the truck lines. By parallel reasoning, and quoting from the opinion of this Court in *American Trucking Association, supra,* the District Court in *Roland* v. *United Airlines,* 75 F. Supp. 25, *supra,* held certain non-transportation employees of the airline not to be within the RLA exemption of FLSA, saying:

> "The exemption of the Fair Labor Standards Act refers to employees of those carriers by air whose business is regulated under the Civil Aeronautics Act. That business is 'air transportation' and not any other business in which a carrier may chance to engage."

Apparently, conceding that NMB's Cape Canaveral decision cannot be justified by a literal reading of the RLA alone, Petitioner points out that NMB assigned additional reasons for its decision. Petitioner claims the Court of Appeals failed to take account of such reasons. Of course, if the Court of Appeals ruled correctly, its decision will not be disturbed even though based on improper grounds.[9] In fact, however, the "further reasons" assigned by NMB in its Cape Canaveral decision were thoroughly discussed in the briefs below, but, apparently, the Court did not regard such reasons as meriting comment in its opinion.

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[9] *Exner* v. *Sherman Power Constr. Co.* (C.C.A. 2nd), 54 F. 2d 510, 80 ALR 686; *Bank of Havelock* v. *Western U. Teleg. Co.* (C.C.A. 8th), 151 F. 522, 4 LRA (NS) 181; *Crossett Lumber Co.* v. *U.S.* (C.C.A. 8th), 87 F. 2d. 930, 109 ALR 1348; *Worcester Felt Pad Corp.* v. *Tucson Airport Authority* (CA 9), 233 F. 2d. 44, 59 ALR 2d. 1121.

We will now briefly review NMB's alternate grounds of decision.

(b) The alternate grounds of decision assigned by NMB in its Cape Canaveral ruling are unsound, and were properly rejected by the Court of Appeals.

In its Cape Canaveral decision, NMB maintained that in the light of the statutory purpose of RLA to provide a means for settling of labor disputes through the NMB processes so as to prevent interruption of commerce, it must take jurisdiction over non-transportation employees if the kind of work performed by them at Cape Canaveral is identical with the work of other employees in the same craft at Pan American's airline bases. This was so, NMB argued, because the community of interests between such employees performing identical kinds of work and operating under common executive controls was such as to make it likely that a strike of non-transportation employees would spread to Pan American's airline terminals.

There are several valid answers to this argument:

(1) The proliferation of labor dispute theory is irrelevant to questions of statutory construction under RLA.

As pointed out by Judge Nordbye in *Jackson* v. *Northwest Airlines*, *supra*, 70 F. Supp. 501, 513, the possibility that a strike of non-transportation employees may spread to the company's operating department is irrelevant to the question of statutory interpretation and does not "require universal application of the Railway Labor Act." As the Court correctly said:

> "The difficulty arises because the same union represents both branches of one company, not because of the effect and relationship of the modification work to the airline activities. Under defendant's theory, the application of the Railway Labor Act would be almost unlimited. Because a strike occurs in one branch of a company does not necessarily mean that one will occur in another

branch which is really unrelated to it, so far as mechanical work is concerned."

Because a strike occurs at NRDS, it would not necessarily follow that picketing would be extended to Pan American's airline terminals in Miami, New York, Los Angeles, or Guam, which have no functional relationship to the Nevada activity and are hundreds, if not thousands, of miles removed from it geographically. As Judge Nordbye acutely observed, such extension of the dispute would more likely arise in consequence of representation of workers at both facilities by a single union (TWU in this case), than because of any functional relationship. Proliferation of a labor dispute from NRDS to Pan American's airline bases would certainly be less probable where the dispute has its focal point in local agreements between Pan American and local building trades unions certified as bargaining representatives of NRDS employees by NLRB than where the dispute centers upon a single system-wide agreement under RLA between the Company and a nation-wide union.

In fact, recent nation-wide strikes involving airline pilots and flight engineers have pointed up the possibility that the real danger to be apprehended is not the proliferation of a labor dispute from Cape Canaveral or NRDS to an airline terminal—but the reverse, with important consequences to the nation's space effort. To guard against such a possibility, Pan American wrote into its current contract with TWU a provision that TWU members would continue work at GMRD installations, notwithstanding a strike at one of Pan American's airline terminals (R 17, TWU-Pan American contract, at page 7, following page 57). If RLA is inapplicable to NRDS, Pan American would be equally free, in negotiations with Respondent unions, to insist upon a contractual stipulation against the much less likely extension of a localized strike at NRDS to Pan American's airline terminals.

(2) The Court of Appeals applied the correct test of employer function which is the only workable basis for delimiting jurisdiction of NMB and NLRB.

By applying the "tenuous, negligible, remote" test to the *similarity of jobs* performed by *employees* in the carrier and non-carrier branches of the employer's business, rather than to the relationship of the functions being performed by the employer in the non-transportation phase of its business to the transportation phase, the NMB has given this test a new twist never intended by the Supreme Court in *Virginian R. Co., supra*, or by any court or administrative devisions following *Virginian*.

The two principles are obviously incompatible. The example given by the District Court (Pet. App. A, pp. 21a-22a) of the airline maintenance painter transferred to like duties at a shoe factory acquired by the carrier, is illustrative of the incompatibility. Under NMB's *employee* function test, RLA jurisdiction would follow the painter to the shoe factory, with an unwarranted encroachment upon NLRB jurisdiction resulting. Under the *employer* function test, it would not, and the painter working in the shoe factory would come under NLRB jurisdiction as intended by Congress. NMB's *employee* functions test is, therefore, contrary to the statutory scheme, completely unworkable, and would result in an unwarranted intrusion by NMB into non-transportation businesses, contrary to Congressional intent.

We suggest respectfully, moreover, that in adopting the *employee functions* test of coverage under RLA, the NMB may have fallen into the error of circular reasoning. It is one thing to say, where RLA jurisdiction over both branches of a carrier's business is unquestioned because both are part of its transportation activity, that for representation purposes all employees who perform similar work in the same craft or class at both installations and who are subject

to common executive control will be considered by the Board to be subject to a system-wide labor agreement covering that craft or class. It is quite another thing to say that a non-transportation branch of a carrier's business must be held as a matter of statutory interpretation to be covered by RLA *because* employees in that branch have similar skills and do similar work to that done by employees in the carrier's transportation business. This amounts to using a test which is valid for craft classification purpose *if RLA jurisdiction exists*, as a test for determining *that such jurisdiction exists.*

(3) The hypothetical shoe factory.

Petitioner belabors the obvious when it suggests that NRDS is not a shoe factory and its personnel are not shoemakers.

The Court of Appeals obviously used that hypothetical analogy because it found on the basis of the District Court record which it was reviewing (not on the basis of the record of NMB's 1956 Cape Canaveral ruling which was not under review by the Court) that a relationship between Petitioner's NRDS activities and transportation is just as "non-existent" as it would be had Petitioner been conducting a shoe factory at NRDS.

Under such circumstances, the Court's reference to a hypothetical shoe factory was most appropriate.

(4) Availability of other Federal laws and agencies.

NMB's Cape Canaveral doctrine mistakenly assumes that if a strike at Cape Canaveral (or NRDS) should proliferate and extend to Pan American's air line bases, no other Federal law or agency exists which could as effectually deal with the situation. The availability of other Federal laws and instrumentalities has already been noted.[10] The pos-

[10] See page 16 of this Brief.

sibility of guarding against such proliferation by contractual stipulation, as Petitioner did under its contract with TWU, has also been suggested.[11]

(5) Doctrine of Jackson v. Northwest Airlines is applicable in the context of the remedial purposes of RLA and LMRA.

Finally, Petitioner argues that *Jackson* v. *Northwest Airlines, supra*, which the Court of Appeals regarded as "directly in point," should not be regarded as controlling because that case was decided in the light of the remedial purposes of FLSA, rather than in the light of the purpose of RLA to provide a dispute-settling procedure so as to prevent interruption of interstate transportation.

But, as the Court of Appeals pointed out, the LMRA, as well as the FLSA, "applies to the generality of labor in the United States" (Pet. App. A, p. 13a), and "Both these generally applicable statutes are important charters of rights of working people," just as is RLA in its special realm of air and rail transportation (Pet. App. A, p. 14a). Consequently, it would seem that the remedial purposes of LMRA and the intent of Congress that it apply to the generality of labor must be given due weight in delimiting the boundary between LMRA and RLA.

Petitioner concedes that in the *Jackson* case, it may have been proper to give a strict construction to the RLA exemption to the overtime provisions of FLSA in order to effectuate the remedial purposes of FLSA, where the consequence of not doing so would have been to deprive the employees involved of statutory protection with respect to overtime. Why was it not equally proper for the Court below, having due regard to the remedial purposes and general applicability of LMRA to give narrow construction to

[11] See pages 16 & 25 of this Brief.

the RLA exemption of rail and air employees from the operation of LMRA (but a construction consonant with the language and purposes of RLA and with previous judicial interpretation thereof) where the consequence of not doing so would have been to subject employees not engaged in transportation activities to restraints not contemplated by LMRA, and to deprive them of rights of self organizaion, representation, and collective bargaining guaranteed by LMRA?

We think the conclusive argument is this: Even if the *Jackson* case is to be distinguished as having been decided in the light of the remedial purposes of FLSA, rather than in the light of the statutory purposes of RLA, a like distinction cannot be made with reference to the decision of this Court in *Virginian R. Co., supra*, or the holding of the Ninth Circut in *Anderson* v. *Bigelow, supra*. Both of these cases were decided under, and in the context of, the purposes of the Railway Labor Act. But the principles applied in holding, in the one case, that the commerce power extends, and, in the other case, that the RLA applies, only to employees of a rail carrier engaged in transportation activities, or those more than remotely, tenuously, or negligibly related thereto, are in full harmony with the holding in *Jackson, supra*, and the decision below.

Notwithstanding the fears of strike proliferation later expressed by NMB in its Cape Canaveral decision, neither the Supreme Court in *Virginia R. Co., supra*, nor the Ninth Circuit in *Anderson* v. *Bigelow, supra*, hesitated to apply the functional test of the closeness or remoteness of the employer's activity to its carrier business merely because a finding against jurisdiction under the Railway Labor Act might permit the strike to spread to the employer's carrier operations. In fact, in *Virginian R. Co., supra*, this Court made it clear that it found the required closeness to bring the case within the scope of the commerce power *because*

of the physical and functional relationship between the employer's "back shop," where its cars and locomotives were repaired, and its operating division, and not because of, but *"quite apart from the likelihood of its (the strike's) spreading to the operating department."* And, in *Anderson v. Bigelow, supra*, having found the RLA inapplicable to the rail carrier's over-the-road trucking department, the Court of Appeals dissolved a lower court injunction against a strike of the trucking department employees, on the ground that such strike was protected from Federal injunction by the Norris-LaGuardia Act.

CONCLUSION

The supposed dichotomy which Petitioner envisions as having been created by the decision below between Petitioner's Cape Canaveral employees over whom NMB has asserted jurisdiction, and its employees at NRDS whom the Court has held free of such jurisdiction, is more apparent than real, and presents no insoluble problems.

If the NMB was wrong, and the Court below right, it simply means that Pan American employees at both installations will have the right to petition the NLRB for representation, or craft-severance, elections so that the various crafts involved may bargain with Petitioner through representatives of their own choosing as contemplated by Sections 7 and 9 of the LMRA. That the process may result in the selection of different bargaining representatives at the two installations is a possibility inherent in the statutory plan. Nor is there anything anomalous or sinister in the possibility that Petitioner's labor relations with its airline pilots, flight engineers, and airplane mechanics at its airline bases may be governed by NMB, while its labor relations with the carpenter, electricians and plumbers at NRDS may be governed by NLRB. This would not be the

first occasion in which a statute has been held applicable to some employees of carrier, but not to others.[12]

The alternative to the above results would be the enforced application against Petitioner's carpenters, electricians, and plumbers at NRDS of a collective bargaining agreement to which they have never consented, negotiated by a bargaining agent whom they have never selected, under conditions unrelated to the economic realities of employment at an installation in the middle of the Nevada desert—in sum, a perpetuation of the very conditions which have brought the present labor dispute into being.

That an incidental consequence of denial of the writ will be to leave Respondent unions free to picket is not a cause for complaint if their picketing is legal, which both Courts below have inferentially found it to be. If such picketing is illegal, denial of NMB jurisdiction will not leave either Petitioner or the Government remediless, in view of the existence of other remedies under State and Federal law.

If this Court should be tentatively of the view that the case below was correctly decided on its merits, we ask the Court to bear in mind that because of the stay issued below, granting of the writ of certiorari would have the effect of prolonging the uncertainty in which both NMB and NLRB find themselves with respect to the question of their respective jurisdictions, would delay representation elections at NRDS until the final decision of this Court, and would, in the meanwhile, perpetuate the labor unrest which has brought this question before the Court. Denial of the writ would immediately end the existing uncertainty, permit both Federal agencies to proceed in their respective spheres, and free the NLRB to conduct the representation elections at NRDS which will terminate the present dispute.

---

[12] *U.S. v. American Trucking Associations, supra; Northwest Airlines v. Jackson, supra.*

Dated: Washington, D. C.
February 5, 1964.

Respectfully submitted,

LOUIS SHERMAN
JOSEPH A. SICKLES
LAURENCE J. COHEN
1200 15th St., N.W.
Washington 5, D. C.
GEORGE RUDIAK
425 Fremont Street
Las Vegas, Nevada
Counsel for Respondents

APPENDIX "A"

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

AFFIDAVIT OF GEORGE RUDIAK

STATE OF NEVADA } ss:
COUNTY OF CLARK }

GEORGE RUDIAK, being first duly sworn, deposes and says:

I am the attorney for Building and Construction Trades Council of Clark, Lincoln, Nye and Esmeralda Counties, Nevada, its affiliated unions; and Teamsters Union Local No. 631, Respondents in the above entitled cause.

I represented Respondents in the District Court and before the Court of Appeals in the above entitled matter, and also in proceedings had before the National Mediation Board in its File No. C-3367. I am therefore familiar with all proceedings in these matters.

Attached hereto, marked Exhibit A-1, is a true copy of a telegram dated August 11, 1963 from James M. Arnold, Secretary of said Building and Construction Trades Council, to the National Mediation Board, denying any claim to represent Pan American employees at NRDS and also denying the jurisdiction of the Board.

On August 12, 1963, I personally mailed to the National Mediation Board a copy of the Reporter's Transcript of the oral decision rendered on August 2, 1963, by the District Court in the above entitled cause. A true copy of my letter of transmittal is attached, marked Exhibit A-2.

Attached hereto, marked Exhibit A-3, is a telegram dated August 15, 1963, from the NMB to James Ryan, President of said Building and Construction Trades Council, stating the time and place set for the NMB hearing.

Attached hereto, marked Exhibit A-4, is a true copy of a letter dated November 7, 1963, which I am informed and believe, and therefore allege, was sent by Roland C. Davis, attorney for Hotel and Restaurant Employees, etc. Union and its Culinary Workers' Union, Local 226, to NMB, transmitting a copy of the decision of the Court of Appeals to NMB and requesting reconsideration of the Board's decision.

Attached hereto, marked Exhibit A-5, is a true copy of a letter from Affiant to the NMB calling attention to the decision of the Court of Appeals, and requesting reconsideration of the Board's decision.

Attached hereto, marked Exhibit A-6, is a true copy of a letter dated November 15, 1963, from NMB to Affiant advising that the request for reconsideration of the Board's decision is under consideration.

Attached hereto, marked Exhibit A-7, is a true copy of a letter dated November 21, 1963, which I am informed and

believe, and therefore allege, was sent by Sherman, Dunn & Sickles, attorneys for the Building and Construction Trades Department of the AFL-CIO to NMB, joining in the request for reconsideration of its decision in view of the decision of the Court of Appeals.

Attached hereto, marked Exhibit A-8, is a true copy of a letter dated December 12, 1963, which I am informed and believe, and therefore allege, was sent to NMB by counsel for Pan American, informing the Board of the order of the Court of Appeals dated December 3, 1963, staying the Court's mandate pending filing by Pan American and disposition of a petition to the Supreme Court for a writ of certiorari.

After the rendition by the Court of Appeals of its decision, at a meeting of Respondent Building and Construction Trades Council at which I was present, it was decided by the Council to commence a drive to organize NRDS employees of Pan American, other than office employees. On December 5, 1963, after this drive had proceeded to a point at which Respondent Building and Construction Trades Council was of the opinion that it represented a majority of such employees, Respondent filed with the National Labor Relations Board, Twentieth Regional Office, a Petition for certification as bargaining representative of such employees. A true copy of said Petition is attached hereto, marked Exhibit A-9.

As of this date, to the best of my knowledge, information, and belief, the NLRB has taken no further steps to process this Petition. I am informed and believe, and therefore allege, that the reason for this delay is the pendency of Pan American's Petition to the Supreme Court of the United States for a Writ of Certiorari to review the decision of the Court of Appeals for the Ninth Circuit in Case No. 18,822, and the uncertainty caused by the pendency of such Petition as to whether the NMB or the NLRB has

jurisdiction over the employees affected.

(s) George Rudiak
GEORGE RUDIAK

SUBSCRIBED and SWORN to before me this 29th day of January, 1964.

(s) *Nubar Wright*
NUBAR WRIGHT (SEAL)
Notary Public in and for said county and state.
My Commission expires May 10, 1963.

EXHIBIT A-1

WESTERN UNION TELEGRAM

AUG. 11, 1963

TO E. C. THOMPSON, EXEC. SEC.
NATIONAL MEDIATION BOARD
1230 16TH STREET, N.W.
WASHINGTON, D. C.

REURTELS JULY 30 AND AUG. 7, PLEASE BE ADVISED THAT ON AUG. 2 UNITED STATES DISTRICT COURT FOR DISTRICT OF NEVADA IN SUIT FOR INJUNCTION BROUGHT BY PAN AMERICAN WORLD AIRWAYS AGAINST BUILDING TRADES COUNCIL AND ITS AFFILIATED UNIONS HELD THAT RAILWAY LABOR ACT DOES NOT APPLY TO PAN AMERICAN EMPLOYEES AT AEC NEVADA TEST SITE STOP. COPY OF COURT'S DECISION FOLLOWS BY MAIL STOP. IN VIEW OF DISTRICT COURT'S DECISION AND SINCE OUR UNIONS DO NOT PRESENTLY CLAIM TO REPRESENT PAN AMERICAN EMPLOYEES AT NEVADA TEST SITE, WE RESPECTFULLY DENY THE JURISDICTION OF NATIONAL MEDIATION BOARD TO HOLD ITS PROPOSED HEARING ON AUGUST 20.

BUILDING AND CONSTRUCTION TRADES COUNCIL
BY: JAMES M. ARNOLD, SECRETARY

EXHIBIT A-2

GEORGE RUDIAK
ATTORNEY AT LAW
Suite 201-202-203 Professional Building
425 Fremont Street
Las Vegas, Nevada
DUdley 2-1322, 2-1323

August 12, 1963

MR. E. C. THOMPSON
Executive Secretary
National Mediation Board
1230 16th Street, N.W.
Washington, D. C.

Dear Mr. Thompson:

With further reference to the night letter sent to you under date of August 11, 1963 by Mr. James M. Arnold, Secretary of the Building and Construction Trades Council of Clark, Lincoln, Nye and Esmeralda Counties, Nevada, I am enclosing herewith a copy of the Reporter's Transcript of the oral decision rendered on August 2, 1963 by the Honorable Roger Foley, District Judge of the United States District Court for the District of Nevada in Case No. 560, entitled "Pan American World Airways, Inc., Plaintiff v. United Brotherhood of Carpenters and Joiners of America, Local Union 1780, et al., Defendants."

Sincerely yours,
GEORGE RUDIAK
Attorney for Building and
Construction Trades Council

GR:hw
Enc.

EXHIBIT A-3

WESTERN UNION TELEGRAM

644A PDT AUG 15 63
OAO41
SYA179 SY WB022 PD
FAX WASHINGTON DC 15 919A EDT
JAMES RYAN, PRES BUILDING TRADES COUNCIL
212 WEST UTAH ST LAS VEGAS NAV

IN ACCORDANCE WITH NMB NOTICE OF HEARING 8-8-63 HEARING SCHEDULED AT LAS VEGAS, NEVADA WILL BE HELD 10AM, TUESDAY, 8-20-63 BEFORE BOARD MEMBER HOWARD GAMSER AT HEARING ROOM IN CONVENTION BUREAU, LAS VEGAS. BY DIRECTION OF NATIONAL MEDIATION BOARD. JOINT GOULARD, O'DONNELL, MILLER, RYAN, GIBBONS, BREEN, DENNIS, SMITH, GILDEA

E C THOMPSON EXEC SECY NMB

8-8-63 10 AM 8-20-63
(40).

EXHIBIT A-4

CARROLL, DAVIS, BURDICK & McDONOUGH
Counselors and Attorneys at Law
420 Balfour Building
San Francisco 4
November 7, 1963

NATIONAL MEDIATION BOARD,
Washington, D. C.

Re: Transport Workers Union of America,
AFL-CIO—Your file No. C-3367

Gentlemen:

Enclosed herewith please find a copy of a Decision and Opinion of the United States Court of Appeals for the Ninth Circuit in the matter of Pan American-World Airways, Inc. vs. United Brotherhood of Carpenters & Joiners of America, etc., et al., No. 18,822. As shown by this enclosed Opinion the question of the applicability of the Railway Labor Act to Pan American's NRDS at Jackass Flats, Nevada, and the jurisdiction of the National Mediation Board over this activity was directly considered by the Court of Appeals, and a direct finding was made by the Court that the Railway Labor Act is not applicable. Not only was your Board's reasoning in the Cape Canaveral case rejected by the Court, but through the cooperation of Pan American the Court had before it your decision in the instant matter before rendering its decision. As is to be seen from the footnote appearing on the last page of the Court's Opinion, the Court nevertheless refused to alter its findings, indicating that your decision in the instant matter, being based on the Canaveral reasoning, was likewise unsound and contrary to law.

We regret that your Board did not see fit to grant our request that you withhold your decision in the instant mat-

ter pending this advice from the United States Court of Appeals for the Ninth Circuit in the Pan American case. However, now that the Court has ruled we presume that you will wish to reconsider your decision in the instant matter and we hereby formally request that you undertake such reconsideration.

Yours very truly,
ROLAND C. DAVIS
Attorney for Hotel and
Restaurant Employees &
Bartenders International
Union, and its Culinary
Workers' Union, Local 226

RCD/bam
cc: Joseph A. Sickles, Esq., Sherman, Dunn & Sickles
1200 - 15th Street, N.W., Washington, D. C.
John F. O'Donnell, Esq., O'Donnell & Schwartz
501 Fifth Avenue, New York, N.Y.
Richard N. Randall, Esq., Chief Counsel's Staff of
Nevada Operations Office, Atomic Energy Commission
Box 1676, Las Vegas, Nevada
Jesse Freidin, Esq., Attorney at law
598 Madison Avenue, New York, N.Y.
David Previant, Esq., Attorney at law
212 West Wisconsin Avenue, Milwaukee, Wisconsin
Benjamin Gettler, Esq., Brown & Gettler
Transit Building, 6 E. Fourth Street, Cincinnati 2, Ohio

EXHIBIT A-5

GEORGE RUDIAK
ATTORNEY AT LAW
Suite 201-202-203 Professional Building
425 Fremont Street
Las Vegas, Nevada
DUdley 2-1322, 2-1323
November 11, 1963

NATIONAL MEDIATION BOARD
WASHINGTON, D. C.

In Re: Your File No. C-3367

Gentlemen:

Your attention is invited to the Decision of the United Court of Appeals for the Ninth Circuit in the matter of Pan American World Airways, Inc. vs. United Brotherhood of Carpenters and Jointers of America, et al, Case No. 18,882, which was rendered on November 5, 1963, and a copy of which is enclosed.

As you will observe, this decision constitutes a direct adjudication that the Railway Labor Act does not apply to the support activities of Pan American World Airways at the Nuclear Reactor Development Station, Nevada Test Site, Nye County, Nevada, and that the National Mediation Board is without jurisdiction over the labor relations of Pan American at this facility.

Inasmuch as the Court directly considered and rejected as legally unsound the decision of your Board with reference to Pan American's Cape Canaveral activity in your File No. C-2202 as well as the more recent decision of your Board in your File No. C-3367 pertaining specifically to Pan American's activity at NRDS, in view of the Court's ruling, we respectfully request that your Board reconsider and reverse its decision in File No. C-3367.

Please consider this letter a formal request for some reconsideration.

Very truly yours,
GEORGE RUDIAK

Attorney for Building and Construction Trades Council of Clark, Lincoln, Nye and Esmeralda Counties, Nevada, United Brotherhood of Carpenters & Joiners of America, Local Union 1780, Operative Plasterers & Cement Finishers International Association, Local Union 797, International Brotherhood of Electrical Workers, Local Union 357, International Union of Operating Engineers, Local Union 12, International Association of Bridge, Structural & Ornamental Ironworkers, Local Union 433, International Hodcarriers and Common Laborers, Local Union 872, Brotherhood of Painters, Decorators and Paperhangers of America, Local Union 159, Sheet Metal Workers, International Association Local Union 88, Plumbers and Pipefitters Local Union 525, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, Local Union 631.

GR:vl

cc: Joseph A. Sickles, Esq., Sherman, Dunn & Sickles
1200 - 15th Street, N.W., Washington, D. C.
John F. O'Donnell, Esq., O'Donnell & Schwartz
501 Fifth Avenue, New York, New York
Jesse Freidin, Esq., Attorney at Law
598 Madison Avenue, New York, New York
David Previant, Esq., Attorney at Law
212 West Wisconsin Avenue, Milwaukee, Wisconsin
Richard N. Randall, Esq., Chief Counsel's Staff of
Nevada Operations Office, Atomic Energy Commission
Box 1676, Las Vegas, Nevada
James M. Arnold, Secretary, Building & Construction
Trades Council of Clark, Lincoln, Nye and Esmeralda
Counties, Nevada
212 W Utah Street, Las Vegas, Nevada

William F. Carter, Teamsters Local Union No. 631
307 Wall Street, Las Vegas, Nevada
Benjamin Gattler, Esq., Brown & Gattler
Transit Building, 6 E. Fourth Street, Cincinnati 2, Ohio
Roland C. Davis, Esq.
420 Balfour Building, San Francisco 4, California

EXHIBIT A-6

NATIONAL MEDIATION BOARD
WASHINGTON
November 15, 1963
File No. C-3367
PAWA - TWU

GEORGE RUDIAK, ESQ.
Attorney at Law
425 Fremont Street
Las Vegas, Nevada

Dear Mr. Rudiak:

This will a knowledge receipt of your letter of November 11, 1963, in which you request a reconsideration of our preliminary decision with regard to jurisdiction of this Board in the above entitled matter. At the present time a question concerning the Board's position in light of the litigation to which you referred is under consideration. Until a determination is made, it will not be possible for us to definitely deal with your request.

It is our hope that we will be able to be responsive within the near future.

Very truly yours,

/s/ E. C. THOMPSON
Executive Secretary

cc: Joseph A. Sickles, Esq., Sherman, Dunn & Sickles
1200 - 15th Street, N.W., Washington, D. C.
Roland C. Davis, Esq., Attorney at Law
Carroll, Davis, Burdick & McDonough
420 Balfour Building, San Francisco 4, California
John F. O'Donnell, Esq., O'Donnell & Schwartz
501 Fifth Avenue, New York, New York
Benjamin Gettler, Esq., Brown and Gettler
Transit Building 6 E. Fourth Street, Cincinnati 2, Ohio

Jesse Freidin, Esq., Attorney at Law
59 Madison Avenue, New York, New York
David Previant, Esq., Attorney at Law
212 West Wisconsin Avenue, Milwaukee, Wisconsin
Richard M. Randall, Esq., Chief Counsel's Staff of
Nevada Operations Office, Atomic Energy Commission
Box 1676, Las Vegas, Nevada

EXHIBIT A-7

SHERMAN, DUNN & SICKLES
1200 Fifteenth Street, N.W.
Suite 500
Washington 5, D. C.
North 7-0155

LOUIS SHERMAN, THOMAS X. DUNN, JOSEPH A. SICKLES,
LAURENCE J. COHEN

November 21, 1963

NATIONAL MEDIATION BOARD
Washington
District of Columbia

Re: Pan American Airways - TWU
Case No. C-3367

Gentlemen:

On November 7 and November 11, Roland C. Davis, Esquire, representing the Hotel and Restaurant Employees Local 226, and George Rudiak, Esquire, representing the Building and Construction Trades Council of Clark, Lincoln, Nye and Esmeralda Counties of Nevada, etc., corresponded with you requesting reconsideration of your decision in the subject case.

It is noted that on November 15 you responded to both gentlemen stating that you would be responsive to said request in the near future.

Please be advised that the Building and Construction Trades Department of the AFL-CIO joins in respectfully requesting you to reconsider your decision in the subject matter based upon the decision of the United States Court of Appeals for the Ninth Circuit in *Pan American World*

Airways, Inc. v. *United Brotherhood of Carpenters, et al*, Case No. 18,822.

Very truly yours,

SHERMAN, DUNN &
SICKLES
JOSEPH A. SICKLES

cc: Roland C. Davis, Esq., Carroll, Davis, Burdick & McDonough
420 Balfour Building, San Francisco 4, California
George Rudiak, Esq.,
425 Fremont Street, Las Vegas, Nevada
John F. O'Donnell, Esq., O'Donnell & Schwartz
501 Fifth Avenue, New York, New York
Richard M. Randall, Esq., Chief Counsel's Staff of Nevada Operations Office, Atomic Energy Commission
Box 1676, Las Vegas, Nevada
Jesse Freidin, Esq.
598 Madison Avenue, New York, New York
David Previant, Esq.
212 West Wisconsin Avenue, Milwaukee, Wisconsin
Mr. Al Bramlet, Culinary Workers Union Local 226
P.O. Box 1430. Las Vegas, Nevada
Benjamin Gettler, Esq., Brown & Gettler
Transit Building, 6 E. Fourth Street, Cincinnati 2, Ohio

EXHIBIT A-8

OLETTI FREIDIN PRASHKER & HARNETT

December 12, 1963

AIR MAIL
NATIONAL MEDIATION BOARD
WASHINGTON, D. C.

Re: File No. C-3367

Gentlemen:

Various labor organizations who are interested parties in this proceeding have called the attention of the Board to the opinion of November 5, 1963 of the United States Court of Appeals for the Ninth Circuit in *Pan American World Airways, Inc.*, v. *United Brotherhood of Carpenters and Joiners of America, Local Union 1780, et al.*, No. 18,822.

The Board should be advised, we think, of the order of the Circuit Court of Appeals, dated December 3, 1963, (a copy of which we enclose) which stayed the Court's mandate and continued in effect its injunction maintaining the status quo at the Nuclear Rocket Development Station, pending the filing by Pan American and disposition of a petition to the Supreme Court of the United States for a writ of certiorari to review the Ninth Circuit's decision.

Very truly yours,

POLETTI FREIDIN
PRASHKER & HARNETT
By
MURRAY GARTNER
Attorneys for Pan American
World Airways, Inc.

MG:imt
Enc.
cc: Roland C. Davis
George Rudiak

John F. O'Donnell
Thomas O. Fleming
David Previant
Benjamin Gettler
J. W. Brown
Joseph A. Sickles

EXHIBIT A-9

Form NLRB-502 (11-59)

Form approved.
Budget Bureau No. 64-R002 12

UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

PETITION

DO NOT WRITE IN THIS SPACE

Case No. 20-RC-5720
Date Filed 12-5-63

INSTRUCTIONS.—Submit an original and four (4) copies of this Petition to the NLRB Regional Office in the Region in which the employer concerned is located.

If more space is required for any one item, attach additional sheets, numbering item accordingly.

The Petitioner alleges that the following circumstances exist and requests that the National Labor Relations Board proceed under its proper authority:

1. Purpose of this Petition *(Check only the one box which is appropriate)*

A. [X] RC—CERTIFICATION OF REPRESENTATIVES (INDIVIDUAL, GROUP, LABOR ORGANIZATION).—A substantial number of employees wish to be represented for purposes of collective bargaining by Petitioner, and Petitioner desires to be certified as representative of the employees for purposes of collective bargaining, pursuant to section 9 (a) and (c) of the act.*

B. [ ] RM—REPRESENTATION (EMPLOYER).—One or more individuals or labor organizations have

presented a claim to Petitioner to be recognized as the representative of employees of Petitioner as defined in section 9(a) of the act.*

C. [ ] RD—DECERTIFICATION.—A substantial number of employees assert that the certified or currently recognized bargaining representative is no longer their representative as defined in section 9(a) of the act.*

D. [ ] UD—WITHDRAWAL OF UNION SHOP AUTHORITY.—Thirty percent (30%) or more of employees in a bargaining unit covered by an agreement between their employer and a labor organization desire that such authority be rescinded.

*NOTE.—If a charge under section 8(b)(7) of the Act has been filed involving the Employer named herein, the statement following the description of the type of petition shall not be deemed made.

2. Name of Employer—**Pan American Airways, Inc.**
Employer Representative to Contract—**Everett Goulard**
Phone No. **384-2252**

3. Address(es) of Establishment(s) Involved *(Street and number, city, zone, and State)*
N R D S Areas 400 Series, Mercury, Nevada

4a. Type of Establishment *(Factory, mine, wholesaler, etc.)*—**Space and Missile Site**

4b. Identify Principal Product or Service—**Maintenance, Operation and Support**

5. Description of Unit Involved *(If more space is needed, continue on another sheet)*
Included—**All personnel except office employees**

Excluded—**Office employees**

6a. Number of Employees in Unit—**140**

6b. Is this Petition Supported by 30% or More of the Employees in the Unit? ☒ Yes ☐ No

(If you have checked box RC in 1.A. above, check and complete EITHER item 7a or 7b, whichever is applicable)

7a. [**X**] Request for recognition as Bargaining Representative was made on **November 29, 1963** and Employer declined recognition on or about **no reply** *(If no reply received, so state)*

7b. [ ] Petitioner is currently recognized as Bargaining Representative and desires certification under the act.

8. Recognized or Certified Bargaining Agent *(If there is none, so state)*

Name—**None**

Address

Affiliation

Date of Recommendation or Certification

9. Date of Expiration of Current Contract, if any *(Show month, day, and year)*

Not known

10. If you have checked Box UD in I.D. above, show here the date of execution of agreement granting union shop *(Month, day and year)*

.....

11a. Is there now a strike or picketing at the employer's establishment(s) involved?

X Yes..... No—**XX**

11b. If so, approximately how many employees are participating?

11c. The Employer has been picketed by or on behalf of

..... — ....., a Labor
(Insert name)

Organization of.....
(Insert address)

Since .....
(Show month, day, and year)

12. Organizations or Individuals other than Petitioner (and other than those named in Items 8 and 11c), which have claimed recognition as Representatives, and other Organizations and Individuals known to have a Representative Interest in any Employee in the Unit described in Item 5 above. (If none, so state.)

Name—**Transport Workers Union**

Affiliation—**AFL-CIO**

Address—**Washington, D. C.**

Date of Claim *(Required only if Petition is filed by Employer)*

I declare that I have read the above petition and that the statements therein are true to the best of my knowledge and belief.

Building and Construction Trades Council, Affiliated Crafts, Stationery Engineers #501 and Teamsters Local #631

.....
(Petitioner and affiliation, if any)

By..... .....**Secretary**.....
(Signature of representative or persons filing petition) *(Title, if any)*

Address—212 W. Utah St., Las Vegas, Nevada 384-8400

(Street and number, city, zone, and State *Telephone number)*

Willfully false statement on this Petition can be punished by fine and imprisonment (U.S. Code, Title 18, Section 100)

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,

Petitioner,

vs.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, et al.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT CULINARY WORKERS UNION LOCAL 226, IN OPPOSITION

ROLAND C. DAVIS,

Attorney for Respondent Culinary Workers Union, Local 226.

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In the Supreme Court
OF THE
United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,
vs.
UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, et al.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR RESPONDENT CULINARY WORKERS UNION, LOCAL 226, IN OPPOSITION

QUESTIONS PRESENTED

Both the United States District Court for the District of Nevada and the Court of Appeals addressed themselves in the proceedings below to the question

of the applicability of the Railway Labor Act (RLA, 45 U.S.C. §§ 151, et seq.) to the activities in which petitioner is engaged at the Nuclear Rocket Development Station (NRDS) at Jackass Flats, Nevada, under contract from the Atomic Energy Commission (AEC) (App. A, pp. 17, 2a).[1] The issue was whether respondents' picketing of those activities was subject to the regulatory provisions of the RLA because Pan American World Airways Inc. (Pan Am) was otherwise a carrier by air for its airline services. If the RLA was applicable, even though admittedly the NRDS operation was unrelated to transportation by air, the United States District Court, it was argued, was not deprived of jurisdiction to restrain respondents' picketing by reason of the provisions of the Norris-La Guardia Act (29 U.S.C. §§ 101-115) (App. A, p. 3a).

Accordingly, the true question arising from the decisions below is:

If an employer is a carrier by air under the Railway Labor Act for its airline activities, do the Federal Courts have jurisdiction to enjoin a labor organization from peacefully picketing in connection with a labor dispute involving exclusively an operation of the employer which is wholly unrelated to and physically separated from any of the employer's airline activities?

Both Courts below correctly answered this question in the negative.

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[1]References are to the Appendices to the Petition on file herein.

The lower Courts were properly concerned with *the nature of the employer's (Pan Am's) function* at NRDS, rather than with the type of skills exercised by the employees who carry out that function (App. A, p. 21a, 13a-15a). Therefore, conceding the necessity for determining, in such a case as this, which remedial labor legislation applies to the employees at NRDS, the second question would be:

Does the National Labor Relations Act (NLRA, 29 U.S.C. §§ 151, et seq.) or the Railway Labor Act apply to employees engaged in an operation of an employer which is unrelated to transportation by air if the employer is otherwise a carrier under the RLA for its transportation connected activities and if the work performed by employees of the non-transportation connected operation is substantially similar to work performed by some of the employer's transportation connected employees?

The Court of Appeals Opinion answers such a question, correctly, we believe, by finding that the employees at NRDS are entitled to the protection of the important rights guaranteed by the NLRA, and consequently, also, to the added immunity of the Norris-La Guardia Act in the exercise of protected concerted activities (App. A, pp. 13a-14a).

STATEMENT OF THE CASE

The analysis of the record herein and of the issues involved which appears in the opinions of both Courts below is clear, succinct and fully supported. We

therefore, rely upon these opinions as our statement of the case.

Pan Am in its "Statement of the Case" in its petition seeks to avoid the consequences of these findings and applicable law by returning to the same arguments heretofore made to both Courts below, to wit, that controlling weight should be given two rulings of the National Mediation Board (NMB) in which that administrative agency extended its jurisdiction beyond the limits of its authority under law so as to include under the RLA Pan Am's support services for the Government's missile and rocket activities at Cape Canaveral (Kennedy) and at NRDS (App. A, pp. 23a, 32a, 40a).[2]

ARGUMENT

1. THE DECISIONS BELOW CONFORM TO THE LANGUAGE OF THE RAILWAY LABOR ACT, THE CONGRESSIONAL PURPOSE AND INTENT IN ENACTING SUCH LEGISLATION, AND ACCORD WITH SOUND JUDICIAL AND ADMINISTRATIVE INTERPRETATION THEREOF.

Any careful examination of the language of the RLA such as was done by the Court of Appeals below necessarily reveals the clear Congressional purposes

[2]That the NMB may now have some belated second thoughts as to its course of conduct in this respect is revealed by its latest ruling made in response to a request by this respondent for reconsideration of its October 29, 1963 ruling. We attach hereto, as an Appendix to this Brief, a copy of said request for reconsideration and the Board's reply, both of which are a part of the Board's official File No. C-3367 referred to in the petition.

to be the regulation of labor relations solely in rail and air transportation.[3]

This Court has on a number of occasions dealt with the troubled history of labor relations on the railroads, and the special techniques devised by Congress, with the aid of railroad management and labor, to remedy the industry's unique labor problems have been exhaustively considered.

California v. Taylor, 353 U.S. 553;

Brotherhood of R. R. Trainmen v. Chicago River & Ind. R.R., 353 U.S. 30, 31 (footnote 2);

Penn R. Co. v. Day, 360 U.S. 548, 557;

NLRB v. Jones & Laughlin, 301 U.S. 1.

See also:

Lecht, *Experience Under Railway Labor Regulations* (1955);

Garrison, *The Railroad Adjustment Board: a Unique Administrative Agency*, 46 Y.L.J. 567;

Report of House Committee on Interstate and Foreign Commerce, Rep. No. 2811, 81st Cong., 2d Sess. 5.

Starting with the decision of this Court in *Virginian R. Co. v. System Federation*, 300 U.S. 515, all courts have considered it necessary to show a connection other than "remote, tenuous or negligible"

[3]For an indication of consistent Congressional purpose when air line transportation was added to the coverage of the RLA in 1936, see *Hearings Before a Subcommittee of the Senate Committee on Interstate Commerce* on S. 2496, 74th Cong., 1st Sess., pp. 5, 9, 12; and 79 *Cong. Rec.* 10059.

with transportation for the RLA to become applicable to any given operation by a carrier. Both Courts below in the instant case relied principally upon *Jackson v. Northwest Airlines,* 70 F. Supp. 501 (1947), and *Northwest Airlines v. Jackson,* 185 F. 2d 74 (1950). We agree that those decisions are controlling and that they constitute reasoned interpretations of the RLA.[4] However, they do not stand alone by any means, and there is no conflict among the circuits or with the rulings of this Court on the law here involved. The Ninth Circuit itself in 1942 reached an almost identical conclusion in *Anderson v. Bigelow* (130 F. 2d 460), and this Court denied certiorari (317 U.S. 690). There the Court of Appeals refused to enjoin picketing in a labor dispute involving a rail carrier's trucking operation on the ground that the RLA was not applicable and therefore Federal Courts were without jurisdiction under the Norris-La Guardia Act.

This Court long ago adopted the obviously sound general proposition that merely because a company is a carrier under the law for some purposes does not necessarily make it a carrier for all purposes.

Kansas City Southern Ry. Co. v. U.S., 282 U.S. 760;

Santa Fe, Prescott Ry. Co. v. Grant Bros. Constr. Co., 228 U.S. 177, 188.

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[4] It is interesting that Pan Am itself was originally also of the same view as the Courts until persuaded otherwise by the NMB. See Pan Am's position expressed in the NMB November 9, 1956 decision (App. A, p. 34a).

It is this principle, together with the *Virginian*, supra, doctrine concerning the necessity for showing a relation to transportation which the Courts have consistently followed in determining the applicability of the RLA to particular activities of a carrier.

Roland v. United Airlines (D.C. for N.D. Ill. 1947), 75 F. Supp. 25;

Bullock v. Capitol Airways, Inc. (D.C. for E.D. N.Y. 1959), 176 F. Supp. 449;

Keele v. Union Pac. R. Co. (S.D. Cal. 1948), 78 F. Supp. 678;

Nelson v. Agwilines (S.D. N.Y. 1946), 70 F. Supp. 497;

Walling v. Connecticut Co. (C.A. 2, 1946), 154 F. 2d 552.

On the administrative side, the results are much the same—with the single exception of the NMB in these Pan Am cases. The Interstate Commerce Commission, which has the statutory duty under the RLA of defining the work of an employee of a carrier (45 U.S.C. 151, Fifth), refused to find that employees of a railroad engaged in servicing an office building owned by the carrier were covered by the RLA. In so ruling the Commission applied the *Virginian*, supra, test, saying, ". . . it is difficult to conceive how it (office building work) could be more remote, tenuous or negligible" (to the carrier's transportation activities).

Hudson and Manhattan Railroad Co. v. Employees-Railway Act, 245 I.C.C. 415, 425.

The NLRB has likewise refused to accept Pan Am's present contention, holding that such a theory would lead to an unlimited application of the RLA whenever a company operates to any extent as a carrier. *Northwest Airlines Inc.*, 47 NLRB 498, 501 (1943). Not only has the NLRB rejected Pan Am's contention in theory, it has also applied the opposite view in practice. See *Northern Redwood Lumber Co.*, 88 NLRB 272 (1950), where the NLRB assumed jurisdiction of a rail carrier's employees who were found to be more connected with the carrier's sawmill activities than with its rail operations. In that case some of the sawmill employees over whom the NLRB took jurisdiction were, as here, performing the same kind of work as the carrier's transportation employees.

These consistent and common sense interpretations of the law are in sharp contrast to the lonely view of the NMB that the employer's function is irrelevant; while similarity of the work performed by the employees is said to be the "controlling factor." (See App. A, p. 38a.)[5]

[5]Both Pan Am and amicus TWU agree that the NMB view of the law which they now embrace would necessarily extend NMB's jurisdiction to mechanics in a shoe factory operated by Pan Am. (Pet. p. 19, Footnote 15; TWU Br. p. 14, Footnote 6).

2. THE COURTS BELOW WERE BOUND TO REJECT THE RULINGS OF THE NATIONAL MEDIATION BOARD IN THAT SAID RULINGS WERE IN EXCESS OF THE BOARD'S LAWFUL AUTHORITY, WERE NOT WELL REASONED, AND WERE IN CONFLICT WITH SOUND JUDICIAL PRECEDENT. AS SUCH THE NMB DECISIONS AND PRACTICES IN THIS CASE ARE ENTITLED TO NO WEIGHT.

Petitioner herein, as well as amicus, advances as the principal argument for granting this Court's writ, the contention that the Court of Appeals failed to give weight to these prior decisions of the NMB.

This is not a case of judicial review of statutory administrative proceedings such as was involved in the cases cited in Pan Am's petition (p. 13) and in the Amicus Brief (p. 8). This is a separate judicial proceeding in equity instituted by Pan Am without prior administrative action in the same case. Even were it not such a case, however, it is clear that the NMB ruling would still be subject to reversal as being beyond its statutory authority and as an arbitrary abuse of power.

Leedom v. Kyne, 358 U.S. 184, 190;

Anti-Fascist Committee v. McGrath, 341 U.S. 123, 140;

Airline Dispatchers Assn. v. NMB (C.A. D.C. 1951), 189 F. 2d 685;

Association for the Benefit of Non-Contract Employees v. NMB (D.C. for D.C. 1963), 218 F. Supp. 114.

Cf. *SUNA v. NMB*, 320 U.S. 297, 321 (dissenting opinion: "The special competence of the National Mediation Board lies in labor relations rather than in statutory construction.").

In any case, it is the ultimate duty of the Courts to construe statutes, and administrative practices thereunder are only persuasive when there has been a long, uniform and uninterrupted acquiescence therein; where the practices are reasonable; when they do not enlarge the statute; and where they are not in conflict with the purposes and policies of an Act of Congress. Moreover, *in the face of judicial construction there is no place for the doctrine of contemporaneous construction by executive officers.*[6]

People ex rel. Healy v. Shedd, 241 Ill. 155, 89 N.E. 332, affirmed 217 U.S. 597;
County of Marin v. U.S., 356 U.S. 412;
U. S. v. Shirey, 359 U.S. 255, 260-261;
Jewell Ridge Coal Corp. v. Local No. 6167, UMW, 325 U.S. 161, 169;
Clerical Employees Assn. v. Bro. Ry. Clerks, 85 F. 2d 152 (C.A. 7, 1936);
Fishgold v. Sullivan Drydock & Repair Corp., 328 U.S. 277.
See 78 L. ed. 322; 84 L. ed. 28 and cases there collected.

Only one U. S. District Court Judge has ever agreed with the NMB (*Biswanger v. Boyd*, 32 CCH Labor Cases § 70,840)[7] and in that case the District

[6]The Courts in the *Jackson* cases, supra, in 1947 and 1950, had criticized and specifically disapproved an administrative ruling under the RLA that a carrier's activities unrelated to transportation were covered by RLA. The NMB nevertheless thereafter refused to follow the Courts' construction of the Act in the Pan Am cases in 1956 and 1963, also ignoring, of course, *Anderson v. Bigelow* (1942), supra.

[7]The adversely affected labor organization had withdrawn from the case prior to the judicial proceedings, and no appeal was taken in *Biswanger v. Boyd*.

Judge summarily rejected the careful reasoning in the *Jackson* cases, supra. Instead, the Court purported to rely upon this Court's decision in *California v. Taylor*, supra. Had the Judge in *Biswanger*, supra, studied this Court's opinion in the *Taylor* case carefully, his conclusion must have been, as was the Court of Appeals in the instant case, that the RLA was intended to apply only to that "singular industry"—interstate transportation by rail (or air)—where "techniques peculiar to that industry" were required and devised by Congress. *California v. Taylor*, supra, at p. 569. No such special legislative treatment has been shown to be required or intended by Congress for the activity here involved, namely, the missile and space industry, an admittedly unrelated field.[8]

In the face of this overwhelming authority, legislative history, and the established labor policy of the United States, these abortive attempts by the NMB to expand its jurisdiction beyond the law can be given no respect by the Courts, and the Courts below had no choice but to reject them. They can have no standing now to support a petition for certiorari to this Court.

[8]See C. Guy Ferguson, "Strange New World", *Occupational Outlook Quarterly*, May 1963 (Vol. 7, No. 2). Note, however, that the executive branch of the Government has given special attention to labor relations in the missile industry (Executive Order No. 10946, May 26, 1961).

3. THE DECISION OF THE COURT OF APPEALS WAS NECESSARY TO PROTECT IMPORTANT STATUTORY RIGHTS OF THE RESPONDENTS, AND THE DECISION HAS NOW SETTLED THE LAW SO AS TO PERMIT ORDERLY ADMINISTRATION OF REMEDIAL LABOR LEGISLATION. THERE IS, THEREFORE, NO REQUIREMENT FOR THIS COURT TO ACT.

Petitioner relies, without any support in the record before the Courts below, upon its self-serving claim that there is some "common and direct interest for labor relations purposes" between the employees at NRDS, in the wilds of the Nevada desert some 90 miles from Las Vegas, and Pan Am's air transportation employees located at its widely separated air terminals (Pet. pp. 3, 12, 18; App. C, p. 65a),[9] From this Pan Am, and apparently the NMB, conclude that the remedial provisions of the RLA must be held to apply to NRDS in order to prevent labor disputes from affecting Pan Am's airline transportation activities. This, of course, is neither a new nor tenable argument for the expansion of the RLA beyond its statutory limits and purpose. Judge Nordbye in the *Jackson* case (70 F. Supp. 501, 513) termed the argument "unsound" and declared, with the approval of the Court of Appeals for the Eighth Circuit, that the possibility that a strike in one branch of a company would create difficulty in another branch scarcely required "universal application" of the RLA, commenting that under such a theory the sweep of the RLA would be "almost unlimited" (Id., 513).

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[9]See R. 401-411 for respondents' objection to the inclusion of the Yordy December 2, 1963 affidavit and related material in the record before this Court.

It is equally unsound to assume with the NMB that failure to apply the RLA to Pan Am's missile and space rocket operations will mean that labor relations in these areas will thereby go unregulated. Absent RLA coverage, the NLRA becomes applicable, as the Court of Appeals pointed out. It follows that the dispute settlement procedures of the Labor-Management Relations Act of 1947 become immediately available (29 U.S.C. §176, et seq.) So do the statutory injunctive rights available to the NLRB (e.g. NLRA §§ 8(b)7 and 10(1)). The services of the Federal Mediation and Conciliation Service could be called upon (29 U.S.C. §§ 171-174), and finally, the President's Missile Sites Commission is specifically charged with responsibility for avoiding such disputes (Executive Order 10946). There would seem to be far less confusion and administrative frustration involved in leaving air and rail transportation disputes to the NMB as Congress intended, and consigning disputes such as this one to these other agencies which are accustomed to them and have the experience with which to handle them.

A fundamental basis for the decision of the Court of Appeals below was a recognition of the necessity for according a proper respect to the rights conferred upon respondents and others by these other remedial labor statutes. It will not do to explain away *Jackson*, supra, as Pan Am attempts, on the ground that the decision in that case was necessary because exemptions from FLSA coverage are to be strictly construed to accomplish the broad remedial purposes of

the statute (Pet. p. 22). As the Court of Appeals saw, this is the very point involved in the instant matter. The NLRA, too, is a broad remedial statute which grants important rights in the public interest respecting self organization of employees and "other concerted activities for the purpose of collective bargaining or other mutual aid or protection" (29 U.S.C. § 157). Thus, the NLRA exemption of RLA coverage (29 U.S.C. § 152(2), (3)) must also be strictly construed, and RLA intrusion into NLRA jurisdiction is not to be lightly inferred from the language of either statute. In the same manner, this Court's careful limitation of the theory of "accommodation" between other labor statutes and the Norris-La Guardia Act, supra, another remedial labor statute, must be respected. *Sinclair Refining Co. v. Atkinson*, 370 U.S. 195.

Among the important rights accorded this respondent under the NLRA is its right to bargain for an appropriate and historical unit of employees at the Nevada Test Site whom it has represented for over 13 years. That bargaining relationship has now been disrupted and respondent's members have lost their jobs as a result of the arbitrary application of Pan Am's Cape Canaveral collective bargaining contract with TWU to these Nevada employees (R. 228-231). As this Court noted in *California v. Taylor*, supra, "systemwide" agreements are a custom and practice, if not a necessity, in the railroad industry. This, however, is not a practice generally followed by the NLRB under the NLRA. In fact, in the case of a

new employer or a new operation, the NLRB almost always permits a self-determination election so that the employees may decide whether they wish to be separately represented.

Houck Transport Co., 130 NLRB 270;
Miratile Mfg. Company Inc., 124 NLRB 48;
Standard Trucking Company, 122 NLRB 761;
Rayette, Inc., 117 NLRB 1399;
Southern California Edison Co., 107 NLRB 951;
Comptometer Corporation, 135 NLRB 74.

Nor will the Board permit a preexisting collective bargaining agreement applicable to other operations of the employer to stand in the way of such an election.

Goodyear Tire and Rubber Co., 80 NLRB 1347;
Miratile Mfg. Co., supra.

The NLRB, as petitioner concedes (Pet. p. 18, footnote 14), is very much concerned with community of interests among employees. The NLRB, and not the NMB, is the proper agency to investigate those interests as they may exist for these local employees who make beds and perform other custodial work at Jackass Flats, Nevada, where there are no railroads or airlines and where the nearest Pan Am air terminal is hundreds of miles away. The NRDS employees, having no relation to air transportation, should have a right to locally determine questions of representation and the scope of collective bargaining without being thrown arbitrarily into a nationwide

assortment of Pan Am's airline mechanics and other "ground service" employees. Whether reference is made to a hypothetical shoe factory or hotel or to a real desert rocket test site makes little difference. Under no condition was the RLA designed or intended for such situations.

The decisions of the Eighth Circuit Court of Appeals in *Jackson*, supra, and of the Ninth Circuit in *Anderson*, supra, should have settled the issues of this case, and the NMB would have been well advised to heed them. The judgment below of the Ninth Circuit Court of Appeals, specifically disapproving, as it does, the NMB's unauthorized and unlawful enlargement of jurisdiction, now settles finally, definitely and properly all questions involved.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for certiorari should be denied.

Dated, San Francisco, California,
February 1, 1964.

Respectfully submitted,
ROLAND C. DAVIS,
Attorney for Respondent
Culinary Workers Union, Local 226.

(Appendix Follows)

Appendix

November 7, 1963

National Mediation Board
Washington, D. C.

Re: Transport Workers Union of America, AFL-CIO—Your file No. C-3367

Gentlemen:

Enclosed herewith please find a copy of a Decision and Opinion of the United States Court of Appeals for the Ninth Circuit in the matter of Pan American World Airways, Inc., vs. United Brotherhood of Carpenters & Joiners of America, etc., et al., No. 18,822. As shown by this enclosed Opinion the question of the applicability of the Railway Labor Act to Pan American's NRDS at Jackass Flats, Nevada, and the jurisdiction of the National Mediation Board over this activity was directly considered by the Court of Appeals, and a direct finding was made by the Court that the Railway Labor Act is not applicable. Not only was your Board's reasoning in the Cape Canaveral case rejected by the Court, but through the cooperation of Pan American the Court had before it your decision in the instant matter before rendering its decision. As is to be seen from the footnote appearing on the last page of the Court's Opinion, the Court nevertheless refused to alter its findings, indicating that your decision in the instant matter, being based on the Canaveral reasoning, was likewise unsound and contrary to law.

We regret that your Board did not see fit to grant our request that you withhold your decision in the instant matter pending this advice from the United States Court of Appeals for the Ninth Circuit in the Pan American case. However, now that the Court has ruled we presume that you will wish to reconsider your decision in the instant matter and we hereby formally request that you undertake such reconsideration.

Yours very truly,

Roland C. Davis

Attorney for Hotel and Restaurant Employees & Bartenders International Union, and its Culinary Workers' Union, Local 226

RCD/bam

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November 15, 1963
File No. C-3367
PAWA - TWU

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Dear Mr. Davis:

This will acknowledge receipt of your letter of November 7, 1963, in which you request a reconsideration of our preliminary decision with regard to jurisdiction of this Board in the above entitled matter. At the present time a question concerning the Board's position in light of the litigation to which you referred is under consideration. Until a determination is made, it will not be possible for us to definitely deal with your request.

It is our hope that we will be able to be responsive within the near future.

Very truly yours,
E. C. Thompson
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Executive Secretary

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC., PETITIONER

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

STATEMENT

The issue in this case is which of two federal labor statutes—the Railway Labor Act or the National Labor Relations Act—applies to non-transportation activities conducted by an air carrier at the Atomic Energy Commission's Nevada test site. Petitioner Pan American is an air carrier which performs housekeeping and general support functions at that site in connection with a program for the development of a nuclear rocket engine, pursuant to a contract which it entered into with the Atomic Energy Commission on June 28, 1963. Prior thereto, the work had been

done by a non-carrier contractor. The work which Pan American performs includes preventive maintenance of electrical, electronic and ventilation equipment and such technical functions as the storage and use of liquid fuel and gas. None of its work is directly related to the carrier's own transportation activities.

Petitioner instituted this suit in the district court to enjoin the respondent labor organizations and the individual respondents from striking, picketing, and otherwise directing pressure against petitioner's operations at the Nevada test site. It contends that these activities violate the Railway Labor Act. (45 U.S.C. 151, *et seq.*), which it considers applicable to the dispute. The district court denied an injunction, and the Court of Appeals for the Ninth Circuit affirmed. It held that the Railway Labor Act is inapplicable because petitioner's operations at the Nevada test site are unrelated to its transportation activities; and, accordingly, that the Norris-La Guardia Act (29 U.S.C. 101, *et seq.*) prohibits an injunction.

Both the United States and the National Labor Relations Board believe that the decision of the court of appeals is correct. The National Mediation Board, however, is of the contrary view, and it has ruled that the Railway Labor Act is applicable not only to this dispute but to a similar dispute that arose in 1956 in connection with this same carrier's similar activities at Cape Canaveral (now Cape Kennedy), Florida. Since this case involves the application of mutually-

exclusive federal labor statutes,[1] and since the agencies which administer those statutes disagree as to which applies, the United States deems it appropriate to present these divergent views to the Court, and to advise the Court of its opinion as to the importance of the question.

DISCUSSION

1. THE MERITS OF THE DECISION BELOW

The provisions of the Railway Labor Act were made applicable in 1936 to "every common carrier by air engaged in interstate or foreign commerce * * * and every air pilot or other person who performs any work as an employee or subordinate official of such carrier * * *" (45 U.S.C. 181). Such provisions apply "to said carriers by air and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee', respectively, in section 151 of this title" (45 U.S.C. 182). Section 151, First, defines "carrier" to include "any * * * carrier by railroad, subject to the Interstate Commerce Act, and any company which is directly or indirectly owned or controlled by or under common control with any carrier by railroad and which operates any equipment or facilities or performs any service * * * in connection with the transportation, receipt, delivery, elevation, transfer in

[1] The definitions of employer and employee in the National Labor Relations Act exclude persons "subject to the Railway Labor Act, as amended from time to time" (29 U.S.C. 152(2), (3)).

transit, refrigeration or icing, storage, and handling of property transported by railroad * * *." (Carriers "subject to the Interstate Commerce Act" are those engaged in "[t]he transportation of passengers or property wholly by railroad * * *" (49 U.S.C. 1).) Section 151, Fifth, defines "employee" to include "every person in the service of a carrier * * * who performs any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted * * *."

(a) The United States and the National Labor Relations Board submit that the court of appeals correctly held that the Railway Labor Act is inapplicable to Pan American's non-transportation activities at the Nevada test site. That conclusion follows from the language, design and purpose of the Act, which show that it should be limited to "transportation activities and that work which bears more than a tenuous, negligible, and remote relationship to the transportation activities" (*Jackson* v. *Northwest Airlines*, 70 F. Supp. 501, 513 (D. Minn.), quoted with approval by the Eighth Circuit in affirming, 185 F. 2d 74, 77).

The first of the Congressionally-declared purposes of the Act is: "To avoid any interruption to commerce or to the operation of any carrier engaged therein" (45 U.S.C. 151a). Similarly, the coverage for air carriers is to "every common carrier by air engaged in interstate or foreign commerce * * *" (45 U.S.C. 181)—a provision which "speaks only in terms of carriers and transportation activities"

(*Northwest Airlines, supra,* 70 F. Supp. at 507). Pan American, when performing housekeeping services at the Nevada test site, was not "engaged in interstate or foreign commerce." In holding that the Railway Labor Act was a constitutional exercise of the commerce power when applied to "back shop" employees, this Court stated: "It is the nature of the work done and *its relation to interstate transportation* which afford adequate basis for the exercise of the regulatory power of Congress" (*Virginian Railway v. System Federation No. 40,* 300 U.S. 515, 557, emphasis added).

While the Act applies to "any * * * carrier by railroad," in the case of a subsidiary company it applies only if the subsidiary "operates any equipment or facilities or performs any service * * * in connection with the transportation, receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, and handling of property transported by railroad" (45 U.S.C. 151, First). Thus, if the work which Pan American does at the Nevada test site had been performed by a wholly-owned subsidiary rather than by the carrier itself, the Act concededly would not apply. It would be most unusual if the determination of which federal labor statute applies should turn upon whether the carrier performs the service itself or through an intermediary.

Moreover, applying the Act to an air carrier's non-transportation services would lead to the unfortunate result that different federal statutes would govern labor relations involving the same work, and perhaps even the same employees, depending upon whether,

at the particular time, the contractor happened to be an air carrier. Indeed, in this very case the same work which Pan American now performs at the Nevada test site was performed prior to June 1963 by a commercial firm to which Railway Labor Act could not possibly have been considered applicable. A further anomalous result of applying the Railway Labor Act to such activities could be that two groups of employees performing the same work at the same installation, perhaps even in close physical proximity, would be covered by different federal statutes depending upon the particular contractor (carrier or non-carrier) for whom they happen to work. In sum, application of the Act to an air-carrier's non-transportation activities that are not related to its transportation operations might, in the long run, be more likely to disturb than to stabilize labor relations.

b. The National Mediation Board, however, is of the view that the Act does apply to Pan American's employees at the Nevada test site. It points to the fact that when Congress extended the Act to air carrier it made it applicable to "every common carrier by air engaged in interstate or foreign commerce * * * and every * * * person who performs any work as an employee or subordinate official of such carrier * * *." As the Board explained (Pet. App. A, 28a), in taking jurisdiction in 1956 over Pan American employees performing similar functions at Cape Canaveral: "The test is simple: Is the employer a common carrier by air engaged in interstate commerce? Does the individual perform any

work as an employee? If both answers are in the affirmative, the Board's jurisdiction is clear."

But even the literal language of the Act does not go as far as the Mediation Board would push it. For the Act is made applicable to air carriers "and their employees in the same manner and to the same extent as though such carriers and their employees were specifically included within the definition of 'carrier' and 'employee'" in the original Railway Labor Act. That Act, however, does not apply to all employees of a rail carrier but only to a person "who perform[s] any work defined as that of an employee or subordinate official in the orders of the Interstate Commerce Commission now in effect, and as the same may be amended or interpreted * * *" (45 U.S.C. 151, Fifth). More than 20 years ago the Interstate Commerce Commission, in holding that elevator operators, elevator starters and information clerks in an office and terminal building were not employees or subordinate officials of the carrier which owned the building, stated: "if the relation of the work of employees to the interstate activities of a carrier is remote, tenuous, and negligible, the Railway Labor Act does not apply to them". (*Hudson & M.R. Co. Employees*, 245 I.C.C. 415, 425 (1941)). Thus, the Interstate Commerce Commission itself has held that the Railway Labor Act only applies to non-transportation activities if the work performed has a significant connection with the carrier's transportation activities; the mere fact that a person is an employee of a rail carrier is not itself enough to bring him under the

Act.[2] A requirement of a functional relationship between the work performed and the carrier's transportation activities is also indicated by the specific limitation that, in the case of employees of a carrier's wholly-owned subsidiary, the Act applies only if the work is performed "in connection with" the carrier's transportation operations.

The Mediation Board supports its reading of the Act by noting that airline employees often do the same work at a non-transportation installation as they do in connection with transportation activities, and that such employees are interchanged between the two types of jobs; and urging that, unless the Act covers non-transportation activities, a labor dispute growing out of them might spread to a carrier's other operations and thus cause the very disruption of transportation which the Act was designed to avoid. To be sure, a labor union which has a dispute with an air carrier involving non-transportation activities might disrupt the carrier's flight operations by striking or picketing, in order to put pressure upon the carrier to settle the non-transportation dispute. In the present case, for example, the Transport Workers Union of America, AFL-CIO, is the exclusive bargaining representative for the classes of

[2] The Commission has not promulgated any definitions of employees or subordinate officials of air carriers and, indeed, on one occasion declined to do so. But these considerations are immaterial to our argument. For we rely on the Commission's action with respect to rail carriers only to show that mere employment by a carrier, without any functional relationship between the work performed and the carrier's transportation activities, is not enough to bring the employee under the Railway Labor Act.

employees who perform the work which Pan American does at the Nevada test site, and it has entered into a collective bargaining agreement with Pan American covering all of such employees within the continental United States. If, as a result of the decision below, Pan American were to attempt to negotiate a contract for its employees at the Nevada test site with another union, the Transport Workers Union might strike Pan American's transportation operations.

It seems doubtful, however, whether the possibility of such a "spill-over" of a labor dispute from non-transportation to transportation activities is the kind of interruption to commerce with which Congress was concerned and which it sought to prevent in the Railway Labor Act. Moreover, a similar "spill-over" would seem equally likely if the non-transportation operations were conducted by a carrier's wholly-owned subsidiary, yet in that case the Act plainly would not apply. If Congress had intended that the possibility of a "spill-over" would be enough to give the Mediation Board jurisdiction over an air carrier's non-transportation activities, it presumably would have given the Board jurisdiction where such activities are conducted by a wholly-owned subsidiary. More likely, it seems to us, is that the Act was intended to apply only to those non-transportation activities which have a significant functional relation to the transportation activities themselves.

The Mediation Board also points to its allegedly settled interpretation of the Act as covering employees of air carriers performing non-transportation

work. But this interpretation was first rendered in 1956 (in the *Cape Canaveral* case), twenty years after the Railway Labor Act was extended to air carriers; and the only other decision applying this interpretation has been the present case, which apparently was decided on the authority of the 1956 decision. Indeed, as we have already noted, the Interstate Commerce Commission has taken the contrary view in interpreting the Railway Labor Act as applied to rail carriers. And while the National Labor Relations Board has in recent years deferred to the Mediation Board's assumption of jurisdiction without inquiring into the question its earlier decisions tend to support the view that the Labor Board and not the Mediation Board has jurisdiction in the present situation.[4]

Accordingly, the Solicitor General believes that the decision below is correct. If certiorari should be granted, he would present the opposing considerations but support affirmance of the court of appeals.

2. THE IMPORTANCE OF THE CASE

Both the Labor Board and the Mediation Board would like a definitive ruling upon the jurisdictional question presented by this case without waiting to see whether other circuits will accept the decision of the Ninth Circuit or a conflict will develop. There is likelihood of further litigation because a ruling in favor of Mediation Board jurisdiction would advance the claims of the Transport Workers Union and other

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[4] *Pan American World Airways*, 115 N.L.R.B. 493.

[5] *Northwest Airlines, Inc.*, 47 N.L.R.B. 498, 51 N.L.R.B. 1012; *Northern Pacific Transport Company*, 89 N.L.R.B. 1561; see, also, *Northern Redwood Lumber Co.*, 88 N.L.R.B. 272.

labor unions which customarily represent railroad and airline employees, whereas Labor Board jurisdiction would be considered advantageous to the jurisdictional claims of rival labor organizations, such as those which represented the employees at the Nevada installation before Pan American took over the government contract.[5] The decision of the District Court for the District of Columbia in *Biswanger* v. *Boyd*, 32 C.C.H. Labor Cases, par. 70,840, upholding the Mediation Board's assumption of jurisdiction over Pan American's employees at Cape Kennedy in 1956, gives encouragement to the former view.

The issue, on the other hand, is very narrow. Pan American is the only employer, subject in some of its operations to the Railway Labor Act, which presently has contracts with the Atomic Energy Commission or other government agencies to do work of a kind normally subject to National Labor Relations Board jurisdiction. Pan American's major contract is at Cape Kennedy, Florida (where it has 6,000 employees), but it also has smaller contracts at Fort Huachuca, Arizona (with 500 employees) and Fort McGregor, Texas (with about 50 employees). Trans World Airlines announced on February 10, 1964, that it had been selected by the National Aeronautics and Space Administration to perform similar maintenance work at the latter's large-scale facility at Merritt Island, Florida, which is adjacent to Cape

[5] There are pending before the Labor Board petitions filed by various non-transportation labor organizations seeking certification as the representatives of various Pan American employees at the Nevada test site.

Kennedy; and that it would negotiate a contract for such work with that agency (New York Times, February 11, 1964, p. 69M, col. 1). While Trans World Airlines has an established bargaining relationship under the Railway Labor Act with the International Association of Machinists, AFL–CIO, there is no establishing bargaining relationship covering its proposed services at Merritt Island.

The only claim of the present case to importance, in the opinion of the Solicitor General, is its potential impact upon operations at Cape Kennedy. Since 1956, Pan American has engaged in collective bargaining with representatives of its employees on the assumption that the Railway Labor Act applies, and labor relations between Pan American and its employees have been stabilized.[6] An ultimate ruling in favor of Labor Board jurisdiction might have a disturbing effect because it might open the door to renewed inter-union rivalry. Uncertainty as to whether the decision below will be followed in the Fifth Circuit—the circuit with jurisdiction over Cape Kennedy and the only other circuit in which operations similar to those at Las Vegas are located—might be something of an unstabilizing influence. These potential consequences, however, are speculative and seem more related to the merits than the current importance of the controversy.

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[6] The current dispute arising out of a strike against the Florida East Coast Railway is not related to, nor affected by, any issue in the present case.

CONCLUSION

While the decision below might lead to significant labor unrest at one highly important government installation and might cause a slight amount of further litigation, the United States does not believe that review by this Court is warranted. The decision of the court of appeals is correct; its reach is limited; and the issue does not appear to be of sufficient importance in the field of labor management relations to call for a resolution by this Court in the absence of a conflict. It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

FEBRUARY 1964.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, et al.,
Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

PAN AMERICAN WORLD AIRWAYS, INC., *Petitioner,* v. UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, et al., *Respondents.*	No. 725

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY BRIEF

Need For The Writ

Respondent Culinary Workers Union argues that the decision of the Court of Appeals "settles finally, definitely and properly all questions involved" (CW. p. 16)* including, we assume, the question of whether an air carrier's space site employees are, or are not, covered by the Railway Labor Act. The other respondents appear to acknowledge "existing uncertainty" in that regard, but state that denial of the petition "would immediately end" it. (B&CT. p. 31). As we see it, the situation is precisely the converse of that

*The opposition brief of Culinary Workers Union, Local 226, is referred to as "CW", that of the remaining respondents as "B&CT."

described by respondents—the Court of Appeals decision has "settled" nothing either "finally" or "definitely," and "existing uncertainty" will not be ended by a denial of certiorari. On the contrary, it will be ended only if this Court grants certiorari and decides the merits.

The "existing uncertainty" is the result of conflicting positions of the Ninth Circuit and of the NMB on an important substantive issue concerning the coverage of the RLA. Nobody denies that a conflict exists over that issue and nobody denies that the issue is important. A denial of certiorari is, of course, not a decision on the merits of that issue [*E.g.*, *House* v. *Mayo*, 324 U. S. 42, 48 (1945)], will add no weight to the Court of Appeals decision, and will not resolve the existing conflict between the NMB and that court on the important issue involved.

Respondents suggest that the NMB *should* now bow to the Ninth Circuit's view of its jurisdiction, albeit the NMB was not itself a party to the proceeding. That would assuredly remove a good part of the conflict. But the NMB has yet to suggest that it will do anything of the kind. On November 15, 1963, ten days after the Ninth Circuit's decision, the Board's Executive Secretary stated that the Board had its position "under consideration" in light of the Court of Appeals' decision. (B&CT, p. 13a). Three months having now passed, the Board has not altered its determination of October 29, 1963 that the employees involved are subject to its jurisdiction.

There is, after all, no denying that the Court of Appeals decision is in irreconcilable conflict not only with the NMB's latest decision with respect to NRDS, but with the whole course of NMB decisions over a period of years respecting carrier employees not directly engaged in transportation. Respondents can offer no reason for assuming that the NMB will now abandon its long-term view of the reach

of the RLA, and of its own jurisdiction with respect to such employees, out of simple deference to the Ninth Circuit's view that the NMB has been wrong for at least the last eight years.* We know, in fact, that the NMB has not heretofore found a much earlier Circuit Court decision, on which the respondents so heavily rely, to be a compelling precedent, and the NMB, just like the NLRB, is free to adhere to its own views of statutory construction until this Court has spoken.

Moreover, on December 5, 1963, respondents filed a representation petition with the NLRB covering Pan Am's NRDS employees (B&CT, p. 19a) and the NLRB has yet to order a hearing. The NLRB, after all, has formally declined to exercise jurisdiction over petitioner's space site employees so long as the NMB does not decline to assert jurisdiction. *Pan American World Airways, Inc.*, 115 N. L. R. B. 493 (1956). The NMB is asserting jurisdiction here, and respondents have offered no reason to suppose that this Court's denial of Pan Am's petition for certiorari will cause the NMB to modify its position and dismantle eight years of administration of the Act.

In any event, it is clear that the underlying "jurisdictional issue" of which unions are to represent Pan Am's NRDS employees** cannot be resolved until it is authorita-

Northwest Airlines, Inc. v. Jackson, 185 F. 2d 74 (8th Cir. 1950).

**The District Court recognized that, in reality, the case involves a "jurisdictional dispute." Pet. App. A, p. 22a. Respondents have tried to suggest that the dispute involves the payment by Pan Am of "sub-standard" wages at NRDS. They say that the wage scales prescribed in collective bargaining agreements between several of them and various contractors [including Reynolds Electrical & Engineering Co. ("REECO")] at the Nevada Test Site (a geographic area of which NRDS is only a part) were certified as "prevailing wages" for *construction work* in that area under the Davis-Bacon Act; that REECO, in addition to being a *construction* contractor for the Nevada Test Site, was Pan Am's predecessor as a support services contractor at NRDS; and that Pan Am's contract with TWU pro-

tively determined whether the NMB or the NLRB has jurisdiction. The NLRB cannot include Pan Am's space site employees (assuming they are subject to the NLRA) in the same bargaining and voting unit as Pan's employees directly engaged in airline operations, who are clearly subject to the RLA. Conversely, if the space site employees are subject to the RLA, the NMB may, as it has done in the past with similar employees, include them in just such a carrier-wide bargaining and voting unit. (See App. A, pp. 32a-39a).

In sum, resolution of the "jurisdictional dispute" between the unions here requires resolution of the jurisdictional question as between the two statutes and the two agencies. Until that happens, Pan American—and its space activities—are in the middle of both "jurisdictional" disputes. So far as we can see, the decision below and this Court's denial of certiorari would settle only this: that the agency charged with defining carrier obligations under the RLA would hold that the Act applies, while a cognizant Court of Appeals when called upon to enforce the carrier's commensurate rights would hold that the Act does not apply. Further elucidation is required and, it is respectfully submitted, should come from this Court in this proceeding.

We respectfully suggest, furthermore, that, if the petition be granted, the Court ask the NMB and the NLRB to participate as *amici curiae*.

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vides for lower rates of pay than those certified as "prevailing wages" under the Davis-Bacon Act for *construction work*. (B&CT, pp. 2-4). But what respondents have studiously neglected to point out is that *Pan Am does not perform construction work at NRDS subject to the Davis-Bacon Act* (Testimony of R. L. Yordy, transcript pp. 21-22; R. 282-83; see also, Pet. App. C, p. 71a), but *maintenance* services (Yordy, transcript p. 10; R. 271; see also, Pet. App. C, p. 70a) under a collective bargaining contract providing for *maintenance* rates of pay.

The Statute

To support their construction of Section 181 of Title 45 as being limited to air *transportation* employees (not air carrier employees), respondents point out that Section 151, Fifth, covering employees of *rail* carriers, states that an "employee . . . includes" any person "who performs any work defined as that of an employee . . . in the orders of the [ICC]". They then argue that "obviously, [the] I. C. C. would not be concerned with defining work of any employees other than those engaged in . . . the transportation of persons or property wholly by railroad." (B&CT, p. 22; see CW, p. 7).

The difficulty with the argument is that it seeks to engraft upon Section 181, covering *air* carriers, a limitation which Congress put in Section 151, applicable to *rail* carriers, but omitted from Section 181. It ignores the fact that the ICC has absolutely nothing to do with air carriers and does not have authority to define the work of air carrier employees or even air transportation employees.*

Section 182 makes plain that the substance of the relevant portions of the rail carrier provisions (including relevant portions of Section 151) are to be incorporated into the air carrier part *as made applicable by Section 181*. What respondents have done is to invert the statute to support their argument that Section 151, rather than Section 181, is determinative of RLA coverage of air carriers and their employees.

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*The ICC has recognized that even as to railroad employees the NMB, not the ICC, has authority under the RLA to determine who are employees under the Act, the ICC's function being only to define the kind of work which those who are employees do. *Ore Dock Foremen and Laborers*, 246 I. C. C. 703 (1941). See also *Hudson and Manhattan R. Co.*, 245 I. C. C. 415, 420 (1941). And, as the petition establishes, the NMB has not limited the definition of employees of rail carriers exclusively to transportation workers. (Petition, pp. 20, 24).

Conclusion

There is an immediate and compelling need for the writ which respondents' briefs simply confirm. They do not deny that the question presented is a basic and important one in the administration of the Railway Labor Act—as they say, the resolution of that issue will determine the respective jurisdictions of the NLRB and the NMB. The question—one which has never been determined by this Court—arises in the context of a square conflict between the Court of Appeals for the Ninth Circuit and the NMB. We respectfully submit that the Court should now exercise its jurisdiction to determine it.

Dated: New York, New York
February 18, 1964.

Respectfully submitted,

JESSE FREIDIN
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 725

PAN AMERICAN WORLD AIRWAYS, INC.,
Petitioner,

v.

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL UNION 1780, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITIONER'S REPLY TO SOLICITOR GENERAL'S MEMORANDUM ON BEHALF OF UNITED STATES, AMICUS CURIAE

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Following the filing of Petitioner's reply brief dated February 18, 1964, the Solicitor General filed a "Memorandum for the United States as Amicus Curiae", urging this Court to deny the petition for certiorari on the ground that "the issue does not appear to be of sufficient importance in the field of labor management relations to call for a resolution by this Court in the absence of a conflict [i.e., between Courts of Appeal]."

We believe the Solicitor General's Memorandum calls for brief comment from the Petitioner, and not simply because the Solicitor General has taken the unusual step of asking this Court *not* to grant certiorari in a case to

which the United States is not a party. For the Memorandum contains disclosures of information not otherwise available to this Court which confirm, in our view, the importance of the issue presented and the necessity for this Court's intervention:

a) In dealing with Respondents' contention that the Court of Appeal's decision settled the law, and that review by this Court was accordingly unnecessary, Petitioner's earlier Reply Brief stated that there was no reason for assuming that the National Mediation Board would now accept the Ninth Circuit's limiting construction of NMB jurisdiction, and abandon its historical position that its jurisdiction extended to certain non-transportation activities of air carriers (Reply Brief, pp. 2-3). The Solicitor General now tells us that the NMB does in fact adhere to its position, despite the Court of Appeals decision:

> "The National Mediation Board is of the view that the [Railway Labor] Act does apply to Pan American's employees at the Nevada test site." (Memorandum, p. 6).

And the Solicitor General's exposition of the NMB's position (pp. 6-10) makes clear that the Board likewise adheres to its 1956 determination that the Railway Labor Act similarly applies to 4,000 Pan American space operation employees at Cape Kennedy. We think it fair to assume, therefore, that Pan American and other air carriers similarly situated will be caught in a conflict unless and until this Court acts to resolve the issue—the NMB will continue to call upon the carriers and the affected labor organizations to perform their respective obligations under the RLA and the Courts of the Ninth Circuit, at least, will decline to enforce those obligations.

b) The Solicitor General states that the National Labor Relations Board believes that the RLA does *not* apply to Pan American's Nevada Test Site operations. (Memorandum, p. 4).* Presumably, the NLRB likewise believes that the RLA does not apply to Pan American's operations at Cape Kennedy. And since, as the Solicitor General says, the RLA and the NLRA are mutually exclusive, the NLRB must be understood as believing that the NLRA *is* applicable to these employees, and that the NLRB, not the NMB has jurisdiction.

c) The Solicitor General indicates that, in view of this conflict between the two federal agencies as to which Act applies, and as to which of the two agencies has jurisdiction, *both agencies* desire that the petition for certiorari be granted. Thus:

> "Both the Labor Board and the Mediation Board would like a definitive ruling upon the jurisdictional question presented without waiting to see whether other circuits will accept the decision of the Ninth Circuit or a conflict will develop." (Memorandum, p. 10).

That "definitive ruling," of course, can come only from this Court.

The Solicitor General confirms that the decision of the Ninth Circuit, rather than settling the issue, is likely to lead

*The question is now formally pending before the NLRB in the form of a representation petition filed with it under §9(c) of the National Labor Relations Act for the very employees involved in this case (B & CT: p. 19a). Since the NLRB has not yet even ordered a hearing on the petition, we must presume that the NLRB position stated by the Solicitor General represents an informal expression of the Board's view, obtained by the Solicitor General for the purposes of the current proceedings in this Court.

to "further litigation" (Memorandum, p. 10),* and "might lead to significant labor unrest at one highly important government installation" (Memorandum, p. 13). In the face of the unsettling consequences which may follow a refusal of this Court to grant certiorari, in the face of the persisting conflict between the two principal national labor agencies as to their respective jurisdictions, and in the face of *their* joint desire that this Court settle that conflict now, the Solicitor General nevertheless purports that this Court should deny certiorari (p. 13).

As we understand it, the United States has at least four separate interests in the controversy now before this Court, each of which suggests that certiorari be granted:

1) The interest of the National Mediation Board in the definition of its jurisdiction. The Solicitor Gen-

*The Solicitor General characterizes the *amount* of such resultant litigation as "slight" (p. 13). There is at least a reasonable probability that the litigation will be anything but "slight." There is, to begin with, a pending representation petition before the NLRB covering the Nevada Test Site employees. It may be that the NLRB will not process that petition despite its own view that it has jurisdiction; the NLRB has indicated, for at least the last 20 years that it will decline to assert jurisdiction in cases of this kind, unless the NMB, "the agency primarily vested with jurisdiction [over air carriers] by terms of the Railway Labor Act," has explicitly declined to assume jurisdiction. *Northwest Airlines, Inc.*, 47 NLRB 498, 501-2 (1943); see also *Pan American World Airways, Inc.*, 115 NLRB 493, 495 (1956). If the NLRB persists in its policy of deference to the NMB, we may have less litigation, but more anarchy. If the NLRB determines to proceed, however, we may have proceedings to enjoin the NLRB from conducting an election for want of jurisdiction (*NLRB* v. *Sociedad Nacional de Marianos de Honduras*, 372 F. 2d 10 (C.A. 5, 1963)) (indeed, we may have comparable proceedings to enjoin the NMB from continuing to assert jurisdiction). If the NLRB asserts jurisdiction we may also have unfair labor practice proceedings under NLRA § 10(b), enforcement or review proceedings under NLRA §§ 10(e) or (f), injunction proceedings under NLRA §§ 10(j) or (l), or work assignment dispute proceedings under NLRA § 10(k). In each of these proceedings the question whether the RLA or the NLRA applies and whether the NMB or the NLRB had jurisdiction will be in issue.

eral tells us that the NMB desires that certiorari be granted.

2) The interest of the National Labor Relations Board in the definition of *its* jurisdiction. The Solicitor General tells us that the NLRB desires that certiorari be granted.

3) The interest of the Atomic Energy Commission in avoiding disruption of operations at the Nevada Test Site. The affidavit of the AEC's cognizant officer in the record before this Court states that the picketing which Pan American has here sought to enjoin as unlawful under the Railway Labor Act would "have extremely serious consequences" (Pet., p. 72a), "will result in substantial irreparable injury to the ROVER program" (id., 76a), and would have "adverse effects on the advanced activities of the United States space program" (Pet. 77a).

4) The interest of the National Air Force and the National Aeronautics and Space Administration in avoiding disruption of operations at Cape Kennedy. As to this, the Solicitor General states that

> "the decision below might lead to significant labor unrest [at Cape Kennedy]."

The Railway Labor Act and the National Labor Relations Act each contain special provisions for resolution of jurisdictional disputes between *unions* (e.g., RLA, § 2, Ninth; NLRA, §§ 8(b)(4)(D), 8(b)7, 9(c), 10(k)). On May 26, 1961, the President established a special Missile and Space Sites Labor Board (Executive Order No. 10946), partly in order to facilitate resolution of jurisdictional disputes between *unions* at places such as Cape Kennedy and the Nevada Test Site; in that connection, the Executive

Order recited that "uninterrupted * * * operations at missile and space sites are imperative."

Here we have a jurisdictional dispute between *unions,* which threatens to interrupt such operations, and whose resolution happens to depend upon resolution of a *jurisdictional dispute between the two federal agencies* charged by statute with resolving such jurisdictional disputes between *unions.*

We submit that it *is* "of sufficient importance in the field of labor management relations" (Memorandum, p. 13), that jurisdictional conflicts between national agencies charged with preventing interruptions in work be resolved before such conflicts cause, at missile and space sites, the very interruptions which those very agencies are severally charged with preventing. We also think it important that Pan American World Airways, Inc., an air carrier and government contractor, and other air carriers similarly situated, shall be able to perform their government contracts and carry on their airline operations without interruptions resulting from jurisdictional conflicts between these agencies, or from conflicts between the agencies and the Courts with respect to agency jurisdiction.

Respectfully submitted,

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